ARIZONA COURT OF APPEALS

DIVISION ONE

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| SUSAN SHOOK, et al.,<br><br>Plaintiffs/Appellees,<br><br>vs.<br><br>RENEWCARE OF SCOTTSDALE, INC., et al.,<br><br>Defendants/Appellants. | No. 1 CA-CV 19-0358<br><br>Maricopa County Superior Court<br>No. CV2017-053385 |

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# APPELLEE'S ANSWERING BRIEF

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## INTRODUCTION

This appeal arises from the trial court's denial of Appellants' motion to compel arbitration.

Plaintiff/Appellee Susan Shook ("Shook") is the daughter of Milris Shook, deceased ("Milris"). Defendants/Appellants are owners, operators and employees of Osborn Health and Rehabilitation ("the Facility")(Defendants/Appellants herein collectively referred to as "Osborn").

Five days after Milris was admitted to the Facility, her other daughter, Andeanna Farnes ("Farnes"), signed two optional agreements to arbitrate disputes arising out of Milris's care at the Facility. Osborn has no record showing that it obtained Milris's consent to authorized Farnes to legally bind Milris. The Osborn employee charged with completion of the admission documents had no recollection of asking Milris if Farnes was authorized to executed documents on her behalf. The only evidence of a discussion with Milris about the admission paperwork came from Farnes. She testified that at the time of Milris's admission--when Milris was in extreme pain and when Facility staff was requesting that she fill out admission

paperwork—Milris told Farnes "you do it". Farnes held a medical power of attorney for Milris but did not hold a general power of attorney and did not have Milris's authority to enter into agreements affecting Milris's legal rights.

After Milris died at the Facility, Shook brought this action against Osborn on behalf of Milris's Estate and her statutory beneficiaries. The Complaint alleges negligence, violation of the Adult Protective Services Act and wrongful death in connection with Milris's care at the Facility.

After Osborn moved to compel arbitration, the trial court held an evidentiary hearing and considered evidence including expert testimony on Milris's lack of competence at the time of admission. The trial court denied the motion in a detailed 6-page minute entry, all supported by the evidence. The trial court ruled that Osborn failed to meet its burden to show that Milris was competent to grant authority to Farnes to sign the arbitration agreements. The trial court further ruled that even if Milris had been competent, the evidence was insufficient to show that she authorized Farnes to execute the arbitration agreements on her behalf. Although Osborn had not

developed this argument, the trial court noted in a footnote that the medical power of attorney Milris executed in favor of Farnes did not include non-healthcare decisions "such as future addressing of legal rights."

Osborn filed a motion for reconsideration, primarily arguing that the trial court was bound by the testimony of Osborn's employee that it was her practice to ask the patient's permission before having a family member execute documents including the arbitration agreements (even though she had no specific memory of asking Milris in this case). The trial court denied the motion without requiring a response. This appeal followed.

On appeal, Osborn argues for the first time that where there is doubt as to whether an arbitration agreement was formed, the federal presumption in favor of arbitration requires this doubt be determined in favor of arbitrability. However, Osborn has waived this argument by failing to raise is with the trial court. In addition, Osborn's argument has been rejected by the United States Supreme Court in *Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287, 301-303 (2010).

Osborn further argues that because the trial court found Milris was incapacitated, the health care power of attorney gave Farnes actual authority to execute the arbitration agreements on Milris's behalf. Osborn also waived this argument at the evidentiary hearing. In addition, persuasive authority from multiple jurisdictions (including recent unpublished decisions from both Divisions of this Court and multiple published opinions from other jurisdictions) hold that whether to sign an optional agreement binding a person to arbitration is not a medical decision and is outside the scope of a health care power of attorney.

Osborn argues that if Milris had the mental capacity to grant Farnes authority, then she granted Farnes actual authority to sign the arbitration agreements. But this argument ignores the trial court's ruling (not disputed by Osborn) that Milris did not have the requisite mental capacity. Moreover, there is insufficient evidence to establish (let alone compel) that the medical power of attorney, or Farnes's writing checks for Milris, established that she had general power of attorney for Milris.

Osborn further argues that the trial court should have been bound by the testimony of its staff member who had no specific recollection of speaking to Milris but who testified that it was her custom and practice to ask the patient if a family member could fill out the admission paperwork and would not have allowed a family member to sign the arbitration agreements unless authorized by the patient. However, the trial court was not obligated to accept the truth of this testimony. The trial court properly considered the evidence and found it unconvincing.

Osborn argues that Shook should be equitably estopped from denying that Farnes had authority to execute the arbitration agreements. But this argument is also raised for the first time on appeal and is waived. Further, Osborn fails to show how Shook previously took a position to her current position that Farnes did not have authority to sign the agreement. Osborn also fails to show how it detrimentally relied upon Farnes signing an optional arbitration agreement that was not a condition to Milris's admission to the Facility.

Osborn fails to provide any reason why the trial court's denial of the motion to compel arbitration should be overturned. The trial court's order should be affirmed.

## STATEMENT OF THE CASE

Shook filed a complaint in Maricopa County Superior Court (ROA 1) alleging negligence, violation of A.R.S. § 46-455 and wrongful death. (*Id.*) Osborn moved to compel arbitration (ROA 14,15) which, after an evidentiary hearing (*See* ROA 47) the trial court denied in an unsigned minute entry ("the Ruling")(ROA 48)(Appendix 1, hereto). Osborn then filed a motion for reconsideration (ROA 50-56) which the trial court also denied (ROA 58)(Appendix 2, hereto). The trial court formalized its denial of the motion to compel arbitration and the motion for reconsideration in a signed order entered on April 8, 2019. (ROA 60). Osborn filed a timely notice of appeal on April 8, 2019. (ROA 61). This Court has jurisdiction to hear this appeal pursuant to A.R.S. §12-2101.01(A)(1).

## STATEMENT OF FACTS

### I. The Complaint

Shook filed this action against Osborn as the personal representative of Milris's Estate and on behalf of Milris' statutory beneficiaries under A.R.S. §12-612. (ROA 1, ¶¶5,6)

Shook's Complaint alleges that Milris was admitted to the Facility on March 18, 2014 where she remained until her death on August 16, 2016. (*Id.*, ¶24) It further alleges that Osborn was aware that Milris's health was compromised with a medical history including vascular dementia, epilepsy, Alzheimer's disease, atherosclerotic heart diseases of the native coronary artery, aphasia, hemiplegia, right side hemiparesis and multiple cerebral vascular accidents. (*Id.*, ¶25) Despite Osborn's knowledge of Milris's condition and the supervision, close monitoring and medical attention required to ensure her health and safety, Osborn failed to give Milris the proper care resulting in her suffering from falls (*Id.*¶29) the development and worsening of pressure ulcers (*Id.* ¶30), suffering from contractures, malnutrition and weight loss, numerous infections including infected wounds and respiratory complications. (*Id.*, ¶¶31-34).

As a result, Shook asserted claims against Osborn for negligence, violations of the Adult Protective Services Act (A.R.S. §46-455) and wrongful death. (ROA 1, ¶¶ 5,6,73-95)

## II. Osborn's Motion to Compel Arbitration

### A. The Motion to Compel.

In response to the Complaint, Osborn moved to compel arbitration. (ROA 14,15) Osborn asserted that Milris was admitted to Osborn for skilled nursing and rehabilitation on March 18, 2014, and that on March 23, 2014, Milris's daughter, Andeanna Farnes ('Farnes") executed two optional binding arbitration agreements on Milris's behalf as her agent: an arbitration agreement relating to medical malpractice claims ("Med-Mal Agreement"), and one relating to claims other than medical malpractice ("Non Med-Mal Agreement")(collectively "the Arbitration Agreements"). (ROA 14, p.2).

Osborn argued that the Arbitration Agreements were enforceable under A.R.S. § 12-1501, and that the burden rested "entirely on Plaintiff's counsel to establish the Agreement is invalid or unenforceable." (*Id.*, 3) Osborn further argued that Farnes had

consented to the Arbitration Agreements on behalf of Milris (*Id.*, 4), that the Arbitration Agreements were not adhesion contracts, did not violate Milris's reasonable expectations, were not unconscionable, and were therefore enforceable (*Id.,* pp.4-7). Osborn also asserted that the Federal Arbitration Act, 9 U.S.C.A. 1, ("FAA") governed these agreements, and that under *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012), the FAA preempted any state law exemption from arbitration for negligence or wrongful death claims. (*Id.,* 7-8)

B. The Response to the Motion to Compel.

Shook opposed the Motion to Compel. (ROA 19,20) She asserted that it was Osborn's burden to show the parties had entered into a valid arbitration agreement. (ROA 19, 5) She argued that Farnes lacked actual authority to bind Ms. Shook to arbitration, and that the health care power of attorney Milris signed in favor of Farnes (herein "the HPOA") did not give Farnes authority to bind her to arbitration (*Id.*, 6-7). She further argued that the Med-Mal Agreement did not apply to Plaintiff's Adult Protective Services Act (hereafter "APSA") claims. Shook further argued that wrongful death claims are not subject to arbitration, citing *Duenas v. Life Care Centers of America,*

*Inc.*¸230Ariz. 130, 138-39 ¶¶24-29 (App. 2014) and *Estate of Decamacho ex rel Guthrei v. La Solana Care & Rehan, Inc.* 234 Ariz. 18, 25 ¶ 27 (App. 2014). (ROA 19, 9-10). Shook distinguished *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530 (2012) cited by Osborn, which held that the FAA preempted a state prohibition against application of pre-dispute arbitration agreements to personal injury and wrongful death claims against nursing homes. *Id.* at 531 (ROA 19, 10, n.7) In *Duenas,* this Court based its decision upon contract law regarding the authority to bind claims belonging to non-signatories to a contract without authority. (*Id.*) There was no Arizona state law prohibiting such agreements, and *Marmet* therefore did not apply.

Shook also argued that: the Med-Mal Agreement is substantively unconscionable (ROA 19, 10-11), the Non-Med Mal Agreement, by its plain language excluded claims that allege violations of APSA, A.R.S. § 46-455, *et seq.* from the arbitration requirement set forth in the arbitration agreement (ROA 19, 11-12), and that the Non-Med Mal Agreement is substantively unconscionable. (ROA 19, p.2)

C. The Reply in Support of the Motion to Compel.

Osborn replied in support of the Motion to Compel. (ROA 27-28) Osborn asserting for the first time that Farnes had testified she "had the authority to make financial decisions for her mother after her stroke and before her admission to Osborn" (*Id.* p.2) even though Farnes only testified that she took over writing her mother's checks and that she did not have the authority to make major financial transactions for her mother (*Id.*, Ex.1 26:3-22). Osborn further argued that Farnes "testified her mother told her to read through and take care of the admission packet that contained the arbitration agreements" which was allegedly "an express grant of authority." (*Id.*, p.2) In fact it was Farnes's testimony that she was called unexpectedly one night and told that Milris was being moved to the Facility. (*Id.*, Ex. 2 33:17-34:16) When Farnes arrived "they were waiving this pack of papers…wanting her to do them" but she was "in severe pain and agitate from the trip" and was saying to Farnes "you do it…." (*Id.*) There is nothing in the record of any specific discussion of arbitration agreements.

D. <u>The Surreply to the Motion to Compel.</u>

Shook filed a Sur-Reply (ROA 32-33) setting forth authority that the burden was on the party seeking to enforce an arbitration agreement that the agreement had been accepted and that, if signed by an agent, that agent had authority to do so. (*Id.* p.2) Shook also pointed out that the record showed that Farnes' testimony showed that Milris made her own financial decisions—Farnes simply was the scrivener. (*Id.*, p.3) Shook further argued that Farnes did not have actual, express or implied authority to bind Milris (*Id.*, p.5-7)[1]

## III. The Evidentiary Hearing

At the March 15, 2019 evidentiary hearing on the Motion to Compel Arbitration, (ROA 47; Transcript of March 15, 2019 Hearing, herein "TR") the trial court heard testimony from Plaintiff's expert witness Dr. Michael Smith, (TR, 18:22-44:10), admitted exhibits into evidence (*Id.*, 14:11-14; 47:5-50:25) and considered the arguments submitted by both sides. (*Id.*, 51:5-102:10) The evidence presented at

[1] Shook also filed an Evidentiary Hearing Memorandum (ROA 39-40).

the hearing is discussed below in connection with its support of the trial court's factual findings.

## IV. The Court's Denial of the Motion to Compel

By minute entry dated March 19, 2019, ("the Ruling") the trial court denied the Motion to Compel Arbitration. (ROA 48; App. 1) Although the parties had not formally requested findings of fact and conclusions of law (*See* ROA generally), the trial court provided detailed specific findings supporting the denial. (*See* ROA 48, generally).

The trial court embraced the policy favoring arbitration agreements but recognized that the "focus is on whether there is a valid agreement to arbitrate." (ROA 48, p.1) The trial court ordered the expedited evidentiary hearing after determining that material issues of fact existed on "whether a valid arbitration agreement exists through agency". (ROA 48 pp.1-2)(citations omitted).

The trial court found that Milris "was admitted into Osborn for skilled nursing care and rehabilitation on March 18, 2014", that five days later, her daughter, Farnes executed two arbitration agreements

"for" her mother, and that Milris did not sign either agreement. (*Id.*, p.2). These facts were undisputed on the record. (TR 16:3-16)

The trial court made detailed findings based on Dr. Michael Smith's testimony, all supported by the record. (ROA 48, pp. 2-3; TR 22:10-44:10) The trial court found Dr. Smith possessed the requisite expertise to opine on whether Milris had capacity to confer authority on her daughter to execute the Arbitration Agreements. (*Id.,* 2). (TR 19:10-20:2) (Osborn has not challenged Dr. Smith's qualifications.)

The trial court reflected that Dr. Smith based his opinion on his review of significant documentation including records from the facility where Milris resided prior to Osborn. (ROA 48, p.2)(TR 20:11-21:22; 22:8-23:10)) The court further noted Dr. Smith's opinion that when admitted, Milris was confused as to time and space, had slurred speech, and suffered from aphasia, which affected her ability to understand or communicate certain concepts. (ROA 48, p.2)(TR 24:13-25:16) He also opined that Milris suffered from dementia as well as two strokes, which Dr. Smith maintained alone was sufficient to conclude a significant level of "cognitive disability". (ROA 48, p.2)(TR 23:1-10) With a record "replete" with entries of Milris's cognitive

limitations, Dr. Smith opined that in late March, 2014, Milris was a "severely impaired individual." (ROA 48, p.2)(TR 25:15-16; 28:2-4; 42:17-19) The trial court noted that Dr. Smith also opined that Milris "was not sufficiently functioning on a 'cognitive level' at the time she may have conferred authority upon her daughter in later March of 2014." (ROA 48 p.2)(TR 21:23-22:7; 25:17-21; 28:8-11)

The trial court referenced Dr. Smith's acknowledgement of challenges in assessing cognitive functioning based solely on a record review, but also that he did not believe such challenges interfered with his overall ability to make this assessment. (ROA 48, p.2)(TR ;40:6-41:5;42:6-19). The trial court further took into account certain shortcomings in Dr. Smith's testimony including his focus on the date of admission, rather than the date the Arbitration Agreements were signed, and his failure to review the records of one of Milris's treating physicians. (TR 38:18-40) The trial court also noted that some evidence in the record seemed to indicate Milris had more cognitive abilities, but the trial court was not ultimately persuaded by that evidence for reasons set forth in detail in the Ruling. (ROA 48, pp.2-4)

Moreover, the trial court noted that

> [t]o the extent that Ms. Shook conferred authority upon her daughter, it appears to have occurred on the day of her admission, not on March 23, 2014, the day in which the Agreements were signed. Therefore, even if her condition improved from March 18 (date of admission) to March 23 (date on which Ms. Farnes signed the Agreements), Osborn has presented no evidence that there was a re-conferring of authority by Ms. Shook on or about March 23, 2014. Osborn is therefore bound by the evidence of Ms. Shook's condition at admission, and that evidence places Ms. Shook's cognitive functioning very must at question.

(*Id.* p.3)

The trial court, after further thorough analysis (*Id.,* pp.2-5), concluded "that Defendant ha[d] failed to meet its burden of proof":

> First, this court cannot conclude that Ms. Shook possessed the sufficient cognitive functioning in order to make a knowing conferring of agency upon Ms. Farnes. Given Osborn's own observations of Ms. Shook at the time of admission, there is no basis to conclude that there was apparent authority upon which Osborn could reasonably rely. As stated in *Escareno v Kindred Nursing Centers West, LLC,* 239 Ariz. 126, 130, 366 P.3d. 1016, 1020 (2016), this form of agency authority arises when "the principal has intentionally or inadvertently induced third person to believe that such a person was his agent although no actual or express authority was conferred on his as agent." There is nothing from the actions of Ms. Shook that would allow Osborn to conclude or rely that she had conferred agency powers upon [her] daughter.
>
> If the court were to conclude that Ms. Shook possessed sufficient cognitive functioning to confer authority upon her daughter, the nature of the alleged

> conferring was wholly inadequate to establish that there was agency for the purposes alleged herein; that being, to execute arbitration agreements. The Agreements were not a condition of admission or treatment. Arbitration agreements are not considered part of the routine paperwork upon admission to a hospital or care facility. There is no evidence that anyone from Osborn explained in Ms. Shook's presence that the admission documents included anything more than commonly understood paperwork. It is an untenable leap for Osborn to claim that by telling her daughter to take care of it or handle it, Ms. Shook made a knowing assignment of decision-making regarding legal rights, if she understood at all what was occurring.

(ROA 48, p.5)

In a footnote, the trial court noted that the existence of a healthcare power of attorney would not be a basis to conclude that Milris conferred authority on Farnes "to address non-health care related decisions, such as future addressing of legal rights" and that if Osborn were to further develop this aspect of their claim, it would still fall short. (ROA 48 p.5, n.3)[2]

## V. The Motion for Reconsideration

[2] In light of its findings, the trial court briefly commented on the unconscionability claims but did not reach those claims. (ROA 48, p.6)

Osborn moved for reconsideration of the Ruling. (ROA 50-56). Osborn cited the testimony of Kimberly Hutchens ("Hutchens") that often a patient would indicate a desire for their child to fill out the paperwork, whom Osborn would then contact. (ROA 50, p.3) Defendants further cited Hutchen's testimony (in response to a leading question) that she never would have allowed Farnes to fill out the admission paperwork (including the arbitration agreements) unless Milris had given her approval. (*Id.*) From this, Osborn argued that Hutchens had a "custom and practice" according to which "she would have affirmed with [Milris] that it was acceptable for her daughter, [Farnes], to sign the admission paperwork, including the arbitration agreement, before she had her sign anything." (*Id.,* citing *Ruesga v. Kindred Nursing Centers, LLC* 215, Ariz. 589, 597 (App. 2007) and *Barron v. Evangelical Lutheran Good Samaritan Society*, 265 P.3d 720 (N.M. App. 2011)).

Osborn also questioned *Kindred Healthcare, Inc. v. Henson,* 481 S.W.3d 825 (Ky. App 2014) (cited by Shook and the trial court) arguing the case was based upon a narrow decision by the Kentucky Supreme Court in *Ping v. Beverly Enterprises, Inc.,* 376 S.W.3d 581 (Ky 2012)

which, according to Osborn was called into question by *Preferred Care of Delaware, Inc. v. Crocker*, 173 F. Supp. 3d 505 (W.D. Ky. 2016).(*Id. 4-8*)

Osborn also quoted extensively from *Barron v. Evangelical Lutheran Good Samaritan Soc.*, 265 P.3d 720 (N.M. App. 2011), asserting it raised "the identical issue presented in this case", but had come to the determination, based on the facts in that case, that the party had actual authority to agree to the arbitration provisions. (*Id.* 8-12)

## VI. The Court's Denial of the Motion for Reconsideration

The trial court denied Osborn's motion (ROA 58, App. 2) without requiring that Shook respond. *See* ARCP Rule 7.1(e)(2). The trial court stated that even assuming the facts as alleged in Osborn's motion – which perhaps could eliminate concerns over how the events of March 18, 2014 impacted the signing of the agreement to arbitrate and executed on March 23, 2014 – Osborn still failed to meet its burden to establish that Farnes had agency allowing her to waive legal rights in the event of a dispute. (ROA 58, p.1) As stated by the trial court, "[t]he fact that [Osborn] is relying upon 'custom and practice' of Ms. Hutchens to determine the scope of authority conferred only further undermines the position of [Osborn]." (*Id.*)

The trial court continued:

> As for the alleged misapplication of holdings from other courts, this court considered such holdings and the rationale for the same but, in the end, ruled based upon the assignment of burden of proof. Plain and simple, Defendant failed to carry its burden of proof that Ms. Shook had conferred upon her daughter the authority to enter into the arbitration agreement. This conclusion was reached after considering the totality of the evidence and arguments presented. Under no circumstances was this ruling intended to imply that arbitration agreements are subject to 'suspect status' or that agreements of this nature are inherently unconscionable.

(*Id*.)

The trial court subsequently signed a formal order denying the Motion to Compel Arbitration and Motion to Reconsider. (ROA 60) Osborn thereafter filed a timely notice of appeal. (ROA 61)

## STATEMENT OF THE ISSUES

1. Did the trial court correctly determine that it was Osborn's burden to show that the Arbitration Agreements had been validly formed and that Farnes had authority to execute the Arbitration Agreements on Milris's behalf?

2. Does federal law preclude the presumption in favor of arbitration from being applied to issues regarding formation of the arbitration agreements? Did Osborn waive any arguments regarding federal preemption?

3. Were the trial court's findings of fact supported by substantial evidence?

4. Do medical powers of attorney include the power to determine future litigation rights through optional arbitration agreements? Did Osborn specifically waive this issue with the trial court?

5. Does Osborn's argument that if Milris had capacity, she granted Farnes actual authority stand in light of the undisputed finding of the trial court that Milris did not have capacity?

6. Was the trial court compelled to find Milris granted actual authority based solely upon the custom and practice evidence of Osborn's employee?

7. Did Osborn waive its promissory estoppel argument by raising it for the first time on appeal, and does the claim also fail on the merits?

## ARGUMENT

### I. This Court reviews the denial of a motion to compel arbitration by deferring to the trial court's discretion on findings of fact but reviewing *de novo* the application of those facts to the law.

The validity and enforceability of an arbitration clause are mixed questions of fact and law, subject to *de novo* review. *Estate of DeCamacho v. La Solana Care & Rehan, Inc.,* 234 Ariz. 18, 20 ¶9 (App. 2014). However, this Court "must defer, absent clear error, to the factual findings upon which the trial court's conclusions are based." *Harrington v. Pulte Home Corp.,* 211 Ariz. 241, 247 ¶16 (App. 2005). *See also, Farmers Ins. Co. of Ariz. v. Young*, 195 Ariz. 22, ¶ 19 (App. 1998) (Deference given to trial court which is in the best position to weigh the evidence, judge the credibility of witnesses, and resolve disputed facts). A finding of fact is not clearly erroneous where it is supported by substantial evidence. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶58 (App. 2008). The consideration and interpretation of legal principles and statutes is *de novo*. *Estate of DeCamacho,* 234 Ariz. at 20 ¶8 (App. 2014).

"The trial court's review on a motion to compel arbitration is limited to the determination as to whether an arbitration agreement

exists." *Estate of DeCamacho,* 234 Ariz. at 20 ¶8 (citations omitted). The trial court in this case correctly identified the subject matter and the limitations of its review, and Osborn does not assert otherwise on appeal. (*See* OB, generally)

## II. The trial court correctly ruled it was Osborn's burden to show the existence of a valid arbitration agreement.

"Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate." *S. Cal. Edison Co. v. Peabody W. Coal Co.,* 194 Ariz. 47, 51 ¶ 11 (1999). "Only when the arbitration provision is enforceable will the court compel arbitration." *WB The Building Company, LLC v. El Destino, LP*, 227 Ariz. 302, 306, ¶11 (App. 2011).

"The fundamental prerequisite to arbitration is the existence of an actual agreement or contract to arbitrate." *Escareno v. Kindred Nursing Centers W., L.L.C.*, 239 Ariz. 126, 129, ¶ 7 (App. 2016)(citations omitted). "Thus, a defendant seeking to compel arbitration must show that the plaintiff accepted the arbitration agreement." *Id.* "Similarly, if the defendant asserts that an agent of the plaintiff signed the

agreement, the defendant bears the burden to show the person in fact was the plaintiff's agent and, thus, had authority to do so." *Id.*

The trial court correctly determined that Osborn had the burden to prove that Milris accepted the arbitration agreement and that Farnes was Milris's agent with authority to sign the Arbitration Agreements. (ROA 48, p.5)

**III. Osborn's argument that disputes as to the formation of an arbitration agreement are presumptively decided in favor of arbitration was waived and is without merit.**

Osborn argues that federal law requires any doubt as to whether a matter is arbitrable—including disputes as to whether an arbitration agreement was formed—must be resolved in favor of arbitration. (OB, 9-11) Citing, *Kindred Nursing Centers Ltd Partnership v. Clark,* 137 S. Ct. 1421, 1428-29 (2017) Osborn argues that Federal Arbitration Act ("FAA") policies govern issues of both formation and enforcement of arbitration agreements. (OB, 10-11) Osborn further quotes *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) for the proposition that "The [FAA] establishes that as a matter of federal law, any doubts concerning the scope of arbitrable issue should be resolved in favor or arbitration…." (OB, 9-10) From this, Osborn

argues that "the FAA applies to formation of the Arbitration Agreements, including the authority of [Farnes] as Power of Attorney to sign it for her mother, and *any doubts should have been resolved in favor of finding the signed Arbitration Agreements valid and enforceable.*" (*Id.*, 11-12)(emphasis in original).

Osborn's argument fails because: 1) Osborn waived the argument by not raising it with the trial court; and, 2) the argument has been rejected by the United States Supreme Court.

A. Osborn waived argument regarding the preference in favor of arbitration by failing to raise the argument with the trial court.

Osborn did not raise its (incorrect) argument that the federal presumption in favor of arbitration requires a finding in favor of arbitrability. (*See* ROA generally). "Matters not presented to the trial court cannot for the first time be raised on appeal." *State ex rel. Brnovich v. Miller*, 245 Ariz. 323, 324, ¶ 5 (App. 2018), *review denied* (Jan. 8, 2019), *cert. denied sub nom. Miller v. Arizona*, 18-9584, 2019 WL 4922139 (U.S. Oct. 7, 2019)(citation omitted). An appellant should afford the trial court and opposing counsel "the opportunity to correct any asserted defects before error may be raised on appeal…." *Trantor v. Fredrikson*,

179 Ariz. 299, 300 (1994); Thus, normally an argument first raised on appeal is waived. *Henderson v. Henderson*, 241 Ariz. 580, 586, ¶ 13, (App. 2017). Osborn has waived its argument by failing to raise it below.

B. Osborn's argument that the presumption in favor of arbitration applies to contract formation issues has been rejected by the United States Supreme Court.

Osborn's argument also fails on the merits.

1. *The U.S. Supreme Court in Granite Rock Co. v. Teamsters held that the "first principle" that arbitration is strictly a matter of consent is not overridden by the policy in favor of arbitration.*

The United State Supreme Court has rejected Osborn's argument that the presumption in favor of arbitrability applies to the formation of arbitration agreements. *See Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287, 301-303 (2010). In *Granite Rock Company*, the Court reversed the Ninth Circuit in a dispute between an employer and a union where the parties agreed that a valid arbitration agreement had been formed but disagreed on when it was formed and thus whether it applied to the dispute. 561 U.S. at 292-95. The Ninth Circuit had held that refusal to send that dispute to arbitration violated two principles of arbitrability: 1) where the parties agreed some

matters were arbitrable, any doubts should be resolved in favor of arbitration (561 U.S. at 298); and 2) the presumption in favor of arbitrability should apply even as to disputes about the enforceability of the entire contract containing an arbitration clause (561 U.S. at 298-99).

The Supreme Court held that the Ninth Circuit had overread its precedents. 561 U.S. at 299. "The language and holdings on which [the union] and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,'' and thus 'is a way to resolve those disputes—*but only those* disputes—that the parties have agreed to submit to arbitration.'' 561 U.S. at 299 (citations omitted).

The Court explained that its cases "invoking the federal 'policy favoring arbitration' of commercial and labor disputes" "recognize that, except where 'the parties clearly and unmistakably provide otherwise,''…it is 'the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning' a particular matter…." 561 U.S. at 301 (citations omitted). "They then discharge this duty by: (1) applying the presumption of

arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted." *Id.* (citations omitted).

"Accordingly," the Supreme Court stated, "we have never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes…that the parties have agreed to submit.'" *Id.* (citations omitted). "Nor have we held that courts may use policy considerations as a substitute for party agreement." *Id.* (citations omitted) "We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issue to an arbitrator) is legally enforceable and best construed to encompass the dispute." *Id.* (citations omitted).

2. *The U.S. Supreme Court reiterated the strong policy of only enforcing arbitration where the parties expressly agreed to it in Lamps Plus, Inc. v. Varela.*

The Supreme Court recently reiterated the strong policy in favor of enforcing arbitration only where the parties expressly agreed to it in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). There the Court held that the FAA bars an order requiring class arbitration where the agreement was ambiguous about the availability of such arbitration. 139 S. Ct. at 1419. The Court reiterated that "[t]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.," further stating "[w] have emphasized that 'foundational FAA principle' many times." *Id.* at 1415 (citations omitted). "Consent is essential under the FAA because arbitrators wield only the authority they are given." *Id.* at 1416. In *Lamps Plus*, the Court held that individual arbitrations and class action arbitrations were fundamentally different, and that where the arbitration agreement was ambiguous as to whether class action arbitrations were contemplated, the Ninth Circuit could not compel arbitration based upon California contract law which construes an ambiguous agreement against the drafter. *Id.* 1417-18.

3. *The cases cited by Osborn are distinguishable.*

The cases Osborn cites in its Opening Brief, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017) and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) are distinguishable. *Moses H. Cone* addressed whether under principles of comity a federal district court should have exercised jurisdiction over a case given a previously filed state court case on the same subject matter, not a dispute involving the formation or an arbitration agreement.

*Kindred Nursing* centers is also not to the contrary. While the Supreme Court held that the FAA applied to contract formation, it did not involve application of the presumption in favor of arbitration, which the Supreme Court has clearly stated is inapplicable to contract formation.

4. *Osborn's public policy argument is unavailing.*

Osborn's discourse on public policy in favor of arbitrability (OB 1-2, 8-12) is irrelevant. The cases Osborn cites for "policy"—except for those standing for the universally accepted policy in favor of arbitration for those who agree to it—are taken out of context. (*In re*

*Denton* 190, Ariz. 152, 156 (1997); *Seisinger v. Siebel,* 220 Ariz. 85, 96 (2009)(OB 7-8). Osborn makes further "policy" statements without any citation to authority or the record, including: 1) that CMS (Medicare) "has blessed the use of pre-dispute arbitration agreements by facilities like Osborn (OB 1)[3]; 2) that arbitration hearing allegedly less stressful to elderly plaintiffs and/or their families than rigors of courtroom trial (OB p.9); and 3) unsupported *ad hominem* attacks on trial counsel for Appellee, without any indication of relevance. (OB p.9, n.4, p.10, n.5).

ARCAP Rule 13(a)(7) requires Osborn to support its contentions "with citations of legal authorities and appropriate references to the portion of the record on which the appellant relies." The Arizona Supreme Court has held that "[i]n Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised." *State v. Carver*, 160 Ariz. 167,

[3] In fact, federal regulations put significant restrictions on the use of arbitration agreements by facilities such as Osborn including ensuring that "[t]he agreement is explained to the resident and his or her representative in a form and manner that he or she understands including in a language the resident and his or her representative understands; [and] the resident or his or her representative acknowledges that he or she understands the agreement. 42 C.F.R. § 483.70(n)(2)(i-ii).

175 (1989) An argument that is not developed or supported with relevant authority is waived. *Polanco v. Indus. Comm'n of Arizona*, 214 Ariz. 489, 491, ¶6 n.2 (App. 2007).

By failing to cite the record or authority, these statements violate ARCAP Rule 13(a)(7)(A) and should be disregarded on that basis. Moreover, not one of these statements changes the fact that based upon the United States Supreme Court's clearly stated holdings, the preferential policy for arbitration cannot be used as a proxy for the requirement that the parties actually agree to submit the dispute in question to arbitration. This argument fails on the merits.

## V. The Trial Court's finding that Osborn failed to meet its burden to show that Milris was capable of knowingly conferring authority on Farnes is supported by substantial evidence.

As set forth above, the trial court made detailed findings supporting its conclusion that Milris lacked capacity at the time of her admission to the Osborn Facility to confer authority on Farnes to sign the Arbitration Agreements. (ROA pp.2-6) These findings were supported by substantial evidence. (*see supra,* 14-18) Osborn acknowledges the trial court's finding on Milris' lack of capacity (OB 12-13) and does not challenge the trial court's finding in its Opening

Brief. (*See* OB, generally). Since substantial evidence exists to support the trial court's findings, and therefore the absence of clear error, this Court should defer to the trial court and accept its findings regarding Milris' lack of capacity. *See Harrington*, 211 Ariz. at 247 ¶16.

## VI. Osborn's argument that the healthcare power of attorney gave Farnes actual authority to enter into the optional arbitration agreement was waived and is not supported on the merits.

While Osborn accepts the trial court's findings on Milris's lack of capacity, it argues that the result is the HPOA Milris previously signed in favor of Farnes gave Farnes actual authority to sign the Arbitration Agreements. (OB 12-14)

Under the HPOA (HR Ex. 7), Milris "as principal designate[d] Andeanna Denis Farnes as [her] agent for all matters relating to [her] health (including mental health) and including, without limitation, full power to give or refuse consent to all medical, surgical, hospital and related health care." (*Id.*, 2) The HPOA became effective "on [her] inability to make or communicate health care decisions." (*Id.*) The HPOA further provided that "All of [Milris's] agent's actions under this power during any period when [she is] unable to make or communicate health care decisions or when there is uncertainty

whether [she] is dead or alive have the same effect on [her] heirs, devisees and personal representatives as if [she] were alive, competent and acting for [herself]." (*Id.*)[4]

Osborn's argument that the HPOA conferred authority upon Farnes to sign the Arbitration Agreements fails because Osborn waived the argument at the evidentiary hearing and because the argument is substantively without merit.

A. Osborn waived its claim that Farnes had actual authority under the HPOA.

Osborn asserts that "*the trial court ignored that Ms. Shook already had appointed Ms. Farnes as her Health Care Power of Attorney in situations where she could not act for herself.*" (OB p.13; *see also* pp.5-6)(emphasis in original) However, at the hearing, Osborn's counsel twice represented the he was not making that argument:

> THE COURT: Here, are you suggesting that the authority that was conferred by [the HPOA] included making legal decisions about potential rights and litigation in the future?
>
> MR. RYAN: Your Honor, I'm glad you raised that because, honestly, that is how it works is that if, in fact,

[4] The Opening Brief misquotes the HPOA, conflating sections of the second and third sentences. (Compare OB at 13 with HR Ex. 7, p.2)

> there is an incapacity that precludes a resident like Mrs. Shook from making the decisions, that's when the healthcare power of attorney kicks in. *So I'm not suggesting that that document in and of itself conferred her authority.* Because Mrs. Shook had the ability and did make all of her own healthcare decisions while she was at Osborn. She was the one who made all of the decisions, and that's from her daughter's testimony. The importance of the fact that there is this healthcare power of attorney more goes to the fact that there is, and would have been, authority had she not been able to make her own decisions.
>
> THE COURT: So you're not saying that the medical power of attorney gave the daughter the ability to sign away legal rights. You're saying the fact that it existed, and that her daughter was not operating under it, is evidence that Ms. Shook was still—had the capacity to make her own decisions?
>
> MR. RYAN: Absolutely.
>
> THE COURT: Okay.

(TR 55:13-56:14)(emphasis supplied). Later, Shook's counsel began to address arguments regarding the scope of the healthcare power of attorney, but was cutoff by the Court stating (and confirmed by Mr. Ryan) that Osborn was not arguing that Farnes had authority under the HPOA:

> MS. BOSSIE: The healthcare power of attorney. Mr. Ryan thinks that confers some type of authority on the daughter. The law in Arizona both the—

THE COURT: He seems to not have argued that. You can correct me.

MR. RYAN: No, I didn't.

THE COURT: What he said was the fact that she knew she had the authority, and was choosing not to exercise it, is evidence that she knew her mother could make her own decisions. Now if I heard that wrong, then I certainly want to hear your argument, which is, okay, what does a healthcare power of attorney confer? And I think you and I have even had this discussion in other cases.

MS. BOSSIE: Correct. We have.

THE COURT: And does it—is it limited to medical decisions? Is a legal decision about arbitration a medical decision? But I asked Mr. Ryan, and he said even though he may have alluded today, he said, that's not what I'm arguing. Mr. Ryan, I don't want to put words in your mouth.

MR. RYAN: No. That's exactly right, Your Honor.

THE COURT: So you need not cover what the scope of the healthcare power of attorney was, independent of what we can infer from it.

MS.BOSSIE: Fair enough. ***

(TR 75:14-76:16)[5]

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[5] Shook's counsel did procced to discuss the cases involving the limitations on the scope of healthcare powers of attorneys in a different context. (TR 76:16-79:5)

Toward the end of the hearing, when the Court was testing various hypotheticals with counsel the following exchange occurred:

> THE COURT: What if she was not cognitively intact? Let's get rid of the word competent.
>
> MR. RYAN: If she's not cognitively intact, it depends on what level. Because dementia—
>
> THE COURT: I'm saying let's go to a level where everybody agrees. She may not be comatose, but she might as well be. In that situation, do you agree, there could be no conferring of authority?
>
> MR. RYAN: I would say that in that situation, then I would specifically argue that the medical power of attorney granted to Ms. Farnes conferred express authority.

(HR TR 97:24-98:11) Mr. Ryan made a similar statement shortly thereafter. (99:12-20). However, these statements contradicted his previous specific representations to the trial court that he was not arguing that the HPOA applied. Based upon this record, and the specific denials by Osborn's counsel that it was arguing the HPOA conferred authority here, it would be reasonable for the trial court to determine that argument had been waived.

The trial court, in fact, did appear to believe that Osborn had either waived the argument that the HPOA conferred authority or had

failed to develop it. In the Ruling, the trial court did not address the issue in the main text, but in a footnote stated:

> The court notes that the existence of a Health Care Power of Attorney would not be a basis to conclude that Ms. Shook conferred authority upon her daughter to address non-health care related decisions, such as future addressing of legal rights. Case law supports this conclusion. Therefore, if Osborn were to further develop this aspect of their claim, it would still fall short.

(ROA 48, p.5n.3) It was incumbent on Osborn to bring to the trial court's attention an issue that Osborn believed was properly before the trial court but that the trial court had failed to address. *See Stein v. Stein*, 238 Ariz. 548, 551 ¶8 n.5 (App. 2015)(Deficiency in findings of fact and conclusions of law must first be raised with trial court).

Osborn waived the issue that the HPOA conferred actual authority on Farnes.

B. <u>Even if the claim were not waived, the optional Arbitration Agreements are not medical decisions and are not within the scope of the HPOA.</u>

*1. Persuasive authority including unpublished decisions from both divisions of this Court and numerous published decisions from other jurisdictions support the argument that optional arbitration agreements are not medical decisions within the scope of a healthcare power of attorney.*

Osborn's argument that the HPOA conferred authority on Farnes to execute optional arbitration agreements is contrary to substantial authority from multiple jurisdictions which hold that medical powers of attorney do not include the power to enter into optional arbitration agreements. *See, Fiala v. Bickford Senior Living Group, LLC*, 32 N.E.3d 80, 92 ¶44 (Ill. Ct. App. 2015)("[A]gent acting pursuant to a health-care power of attorney is not authorized to sign the [optional] arbitration provision and the patient cannot be bound by the agent's action."); *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 593 (Ky. 2012)(An "agent acting pursuant to a health-care power of attorney is not authorized to sign the [optional] arbitration provision and the patient cannot be bound by the agent's actions); *Koricic v. Beverly Enterprises, Nebraska, Inc.*, 773 N.W.2d 145, 148, 151 (Neb. 2009) (son's authority to admit mother to long-term care facility and make healthcare decisions" did not extend to signing an [optional] arbitration agreement."); *Primmer v. Healthcare Industries Corp.,* 43 N.E.3d 788, 793-94 ¶19 (Oh. Ct. App. 2015)("The decision to sign a free-standing arbitration agreement is not a health care decision if the

patient may receive health care without signing the arbitration agreement.")

While Arizona courts have not yet issued a published opinion on whether a healthcare power of attorney is broad enough to encompass the authority to enter into optional binding arbitration agreements with the healthcare provider, unpublished decisions from both Divisions of this Court have concluded that consent to optional arbitration is not a healthcare decision that falls within the scope of a healthcare power of attorney. *See Yazedijian v. ARC Santa Catalina Inc.,* 2018WL 615106 at *5, ¶20 (Ariz. Ct. App. Div. 2, January 29, 2018)("Whether to sign a nursing home's optional arbitration agreement is not a healthcare decision.")(cited pursuant to Ariz. Sup. Ct. Rule 111(c) as persuasive authority only (copy attached as App. 3); *Hurst v. Silver Creek Inn, L.L.C.,* 2015 WL 3551874, at *5, ¶22 (Ariz. Ct. App. June 4, 2015)(In the context of A.R.S. §36-3231(A)(2), "[w]hether to agree to arbitration is not a health care decision, particularly where, as here, the agreement to arbitrate is not a condition of admission or treatment.") cited pursuant to Ariz. Sup. Ct. Rule 111(c) as persuasive authority only (copy attached as App. 4)

Thus, even if Osborn did not waive the argument of whether the HPOA conferred authority on Farnes to sign the optional arbitration agreements, the caselaw cited above confirms that the HPOA did not include future limitation of legal rights such as arbitration. Osborn's argument also fails on its merits.

2. *The cases cited by Osborn are not to the contrary.*

The cases Osborn cites do not support the proposition that Milris's HPOA authorized Farnes to execute the arbitration agreements. In *Mathews ex rel. Mathews v. Life Care Centers of America, Inc.*, 217 Ariz. 606, (App. 2008), this Court held that the Arizona Adult Protective Services Act did not preclude enforcement of an otherwise valid voluntary arbitration agreement. 217 at 610 ¶9. There, the granddaughter of the patient who signed the arbitration agreement "had general power of attorney to make decisions and enter agreements on [the patient's] behalf. 217 Ariz. at 607 ¶2. The granddaughter's authority to execute the arbitration agreement was not at issue.

In *Ruesga v. Kindred Nursing Ctrs., LLC*, 215 Ariz. 589 (App. 2007), Division 2 of this Court upheld the trial court's finding that the

patient's wife had implied actual authority to execute an ADR agreement on his behalf. This decision was based, in part, on the lower standard required to show agency between spouses. 215 Ariz. at 598 ¶33. It was further based on evidence of other instances where in earlier documents, the patient has failed to contest his wife's signatures as "Agent or Legally Authorized Representative. 215 Ariz. at 599 ¶35. Notably, the Court in that case noted that the wife had statutory authority "to make health care decisions" for her spouse, under A.R.S. § 36-3231(A)(1) but did not find this dispositive or rely upon it in determining whether the wife had agency authority on behalf of her husband to sign the ADR agreement. 215 Ariz. at 599 n.7. Thus, nothing in *Ruesga* suggests that signing an ADR/arbitration agreement is a "health care decision".

In *Duenas v. Life Care Centers of America, Inc.*, 326 Ariz. 130 (App. 2014) this Court held that the arbitration agreement in that case was not procedurally unconscionable and not a contract of adhesion, held that the language of the arbitration agreement purporting to bind statutory heirs to arbitrate wrongful death claims was unenforceable, and that arbitration agreements signed for the resident's first two

admissions did not control claims arising from resident's subsequent admissions where she did not sign an arbitration agreement. The plaintiff in *Duenas* did not challenge the enforceability of the arbitration agreements on the basis that they were signed by someone not authorized to do so. *Duenas* is distinguishable on this basis.

Likewise, in *Estate of Decamcho ex rel Guthrie v. La Solana Care and Rehab, Inc.*, 234 Ariz. 18 (App. 2014), whether the patient's daughter had authority to sign an arbitration agreement was not a disputed question determined by the Court.

## VII. Because Osborn did not contest the trial court's finding that Milris lacked capacity to grant Farnes authority, its arguments based on the assumption that Milris had sufficient mental capacity are mere hypotheticals which this Court need not pursue and are not supported on the merits.

### A. Osborn's argument assumes Milris had sufficient mental capacity, contrary to findings of the trial court which Osborn does not dispute on appeal.

Osborn argues (OB 14-15) that "[i]f Ms Shook had the mental capacity to grant Ms. Farnes authority on March 23, 2014, then she granted Ms. Farnes express actual authority to sign the admission paperwork, including the arbitration agreements, due to Ms. Shook's

express request that her daughter do so." (OB 14, Heading C) Osborn, however, has not challenged the trial court's factual finding that Milris did not have the mental capacity to grant Farnes authority to sign the arbitration agreements at the time she told Farnes to do the paperwork. Therefore, this argument is simply a hypothetical contrary to the uncontested findings of the trial court and need not be pursued further.

B. Even if Milris had capacity to authorize Farnes to execute the Arbitration Agreements, the evidence does not compel or even support this finding, which would contradict the findings of the trial court.

In addition, the argument also fails on the merits for a number of reasons. First, the evidence shows that Milris told Farnes to take care of the paperwork on the date of her submission—March 18, 2014—not on March 23, 2014, the date Farnes completed the paperwork. The trial court also made this finding (ROA 48, p.3). Thus, even if Milris had mental capacity on March 23, 2014 does not establish that she had the requisite mental capacity on March 18, 2014 when the delegation of authority allegedly took place. And, as the trial court noted "Osborn has presented no evidence that there was a re-

conferring of authority by Ms. Shook on or about March 23, 2014." (ROA 48, p.3) Thus, Osborn's argument is also flawed, even assuming that Milris had the mental capacity to delegate authority on March 18, 2014 at the time of her admission.

Osborn further argues that Farnes "had authority to take care of her mother's financial/business dealings" citing only to ROA 27-28 Exh. 1, its reply in support of the Motion to Compel. Exhibit 1 includes portions of Farnes' deposition. In that deposition, she testified that after her mother suffered a stroke, Farnes took over writing her mother's checks from a joint account "because she couldn't write legibly". (ROA 27-8 Ex 1, 25:25 -26:9) However, Farnes also testified that she did not make major purchases for her mother such as vehicles, homes and leases (*Id.*) Moreover, in portions of the deposition not attached to Defendants' Reply, Ms. Farnes testified that Milris, not Farnes, signed the papers at the Glencroft assisted living (TR Ex 6 27:9-17) and that after the stroke, while Farnes filled out paperwork, Milris would do the signing. (*Id.* 27:18-23) Milris would sign her own admission papers at the hospital. (*Id.* 29:5-14) So while Farnes assisted her mother, nothing in the record cited by Osborn supports the

assertion that Farness "had authority to take care of her mother's financial/business dealings."

C. *<u>Ruesga</u>* <u>is distinguishable and does not compel a finding of actual agency.</u>

*Ruesga* is distinguishable. In *Ruesga*, Division 2 of this Court upheld the trial courts' ruling finding that there was sufficient evidence to establish an agency relationship between the patient/husband and his wife. Focusing on the acts of the husband that demonstrated his approval of his wife's agency, the Court there stated: "Accordingly, we agree with Desert Life that 'the trial court properly determined that there were sufficient facts to show that both [Robert's] actions and his wife's long history of making decisions on his behalf gave rise to an agency relationship such that [Florentine] could bind her husband to the ADR agreement.'" 215 Ariz. at 599 ¶36. Here, the trial court ruled that the evidence was not sufficient to establish agency. The trial court's factual findings on agency "is not clearly erroneous if substantial evidence supports it." 215 Ariz. at 597 ¶26 (citation omitted), and here, as set forth above, substantial evidence supported the trial court's findings. (*See supra* at 14-18)

Further, in *Ruesga,* at issue was the alleged agency relationship with a spouse; here it with a daughter. "The degree of proof required to establish and define the agency relationship between spouses is lower than with non-spouses. *Escarano v. Kindred Nursing Centers West, LLC*, 239 Ariz. 126, 130 ¶10 (App. 2016) Moreover, Farnes' financial relationship with her mother—where she wrote her mother's checks from a joint account but would not make major purchases for her mother—does not compel (or even support) a finding that she had general agency authority from her mother or agency authority with respect to her mother's financial affairs. And, as set forth above, the HPOA governs medical decisions, not financial decisions.

## VIII. Osborn's argument that Hutchens' custom and practice/habit testimony compels a finding that Milris granted actual authority to Farnes to sign the Arbitration Agreements is meritless.

Osborn argues (OB 15-21) that Hutchens' custom and practice/habit testimony compels a finding that Milris granted actual authority to Farnes because Hutchens testified she would not otherwise have had Farnes sign. This argument is meritless.

There is no basis for Osborn's argument that the trial court was required to accept Hutchen's testimony of her custom and practice that she would not have allowed Farnes to fill out the admission paperwork including the arbitration agreements unless Milris told it was "okay for her to do it". (ROA 15-17). The record does not show that the trial court excluded the evidence of habit or routine. It simply did not find the evidence persuasive, particularly in light of Hutchen's lack of any specific memory of having received permission from Milris to have Farnes execute the Arbitration Agreements.

Osborn's argument that "the fact that Ms. Farnes proceeded to fill out all the admission paperwork with Ms. Hutchens both corroborates Ms. Hutchens' custom and practice, and establishes implied actual authority" is meritless. (OB p.18)(emphasis omitted). Nothing about Farnes filling out the paperwork establishes implied actual authority, which cannot be established solely by the acts of the agent. *Escareno*, 239 Ariz. at 131 ¶11 ("[I]t is well settled that the declarations of an agent are insufficient to establish the fact or extent of his authority.) Further, nothing about Farnes filling out the paperwork with Hutchens corroborates Hutchens' alleged practice

that she would not have done so unless receiving the express consent from Milris. That Farnes filled out other documents that are not at issue in this dispute does not establish that she had authority to act as Milris's general agent.

## IX. Osborn's promissory estoppel argument has been waived and is substantively without merit.

Osborn's final argument is that Farnes' signing of the Arbitration Agreements somehow estops her sister, Shook—the plaintiff in the case below—from arguing that Farnes did not have authority to bind Milris. (OB 21-23). Osborn has waived this argument as well. The argument is also without merit.

### A. Osborn waived the promissory estoppel argument by raising it for the first time on appeal.

Osborn's estoppel argument is raised for the first time in the Opening Brief. The Opening Brief shows no citation to the record where Appellants made the estoppel argument to the trial court. (*See* OB, *generally*) Nor is there evidence in the record that the estoppel argument was made prior to its appearance in the Opening Brief. (*See* ROA *generally*)

"Matters not presented to the trial court cannot for the first time be raised on appeal." *State ex rel. Brnovich* 245 Ariz. at 324. Osborn failed to raise the estoppel argument in the trial court. Osborn has waived the issue by not raising it below.

B. <u>Even if the Court were to consider the promissory estoppel argument, it fails base upon the substantive law.</u>

In addition to waiving the estoppel claim, Osborn has also failed to support its argument that Shook is somehow estopped by Farnes' signature. Osborn cites *Gorman v. Pima County,* 230 Ariz. 506, 510-11 (App. 2012) for the proposition that the elements of estoppel are: "1) the party to be estopped commits acts inconsistent with a position it later adopts; 2) reliance by the other party; and 3) injury to the later resulting from the former's repudiation of its prior conduct." (OB, 22). However, Osborn failed to show how the elements of estoppel are met in this case.

1. *Shook, not Farnes, is the named plaintiff in this case and there is no showing that Shook previously took a position inconsistent with her position here.*

Shook is the plaintiff in this case, (ROA 1) pursuing the claim on behalf of the estate and the statutory beneficiaries. However, it is

undisputed that Farnes, not Shook, signed the Arbitration Agreements. Osborn has presented nothing in the record showing that Shook previously took a position inconsistent with her position here, *i.e.*, that Farnes was not authorized to sign the Arbitration Agreements for Milris. (*See* OB, generally) And, Osborn has cited no authority establishing how Farnes' actions equitably estop Shook. (*Id.*)

2. *Osborn fails to demonstrate how it relied upon Farnes' signature to its detriment when the Arbitration Agreement was optional.*

Further, Osborn has also failed to show how it "relied" upon Farnes' signature to their detriment. The Arbitration Agreements were optional—Osborn would have provided care regardless of whether they were executed. Appellants fail to show how they took any actions in detrimental reliance on Farnes signatures on the Arbitration Agreements.

3. *The cases cited by Osborn do not support a claim for promissory estoppel on these facts.*

The only equitable estoppel cases Osborn cites--*Gorman v. Pima County*, 230 Ariz. 506 (App. 2012) and *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576 ¶35 (1998)--provide no support for its

arguments. In *Gorman,* this Court held, among other things, that the plaintiffs/appellants in that case had failed to present evidence to support their claim of promissory estoppel sufficient to withstand summary judgment and had affirmed the trial court's dismissal of their claim. Nothing in *Gorman* remotely supports Appellants argument here that the actions of a sister of the plaintiff in signing optional arbitration agreements.

Likewise, in *Valencia*, the Arizona Supreme Court set forth the elements of estoppel, held that in certain circumstances equitable estoppel could be asserted against the Arizona Department of Review, and found that summary judgment could not be rendered to either party. 191 Ariz. at 576-7 ¶35, 191 Ariz. 582 ¶¶55,56. However, nothing in *Valencia* establishes that one is estopped by the actions of one's sister or that detrimental reliance can be shown where the Arbitration Agreements are optional.

Osborn failed in the Opening Brief to develop any argument or provide any citations to legal authority or evidence in the record supporting the argument that Farnes' act of signing the Arbitration Agreements equitably estopped Shook or the Estate from arguing that

Farnes did not have authority to do so. Stating "[i]t cannot be" (OB, 23) is insufficient to support the argument. Osborn has waived the argument, and it should not be considered. ARCAP Rule 13(a)(7); *Polanco*, 214 Ariz. 489, 491, ¶6 n.2 (App. 2007).

## CONCLUSION

For the foregoing reasons, Plaintiff/Appellee requests that this Court affirm the trial court's order denying Defendants/Appellees' motion to compel arbitration, and that the Court award Plaintiff/Appellee her reasonable costs incurred herein pursuant to A.R.S. §12-341.

RESPECTFULLY SUBMITTED this 6th day of Novmber, 2019.

MARK J. DEPASQUALE P.C.

/s/ Mark J. DePasquale

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## CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns a brief, and is submitted under Rule 14(a)(5).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced and contains 10,133 words.

3. The document to which this Certificate is attached does not exceed the word limited that is set by Rule 14.

/s/ Mark J. DePasquale
Mark J. DePasquale

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# APPENDIX 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-053385 03/18/2019

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
W. Tenoever
Deputy

SUSAN SHOOK

v.

RENEWCARE OF SCOTTSDALE INC, et al.

MELANIE L BOSSIE

MICHAEL J RYAN

JUDGE BRUCE COHEN

**ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the court on Defendants' Motion To Compel Arbitration filed on October 4, 2017. The court has considered the Motion, Plaintiffs' Response filed on November 3, 2017, Defendant's Reply filed on June 29, 2018, Plaintiff's Sur-Reply filed on July 18, 2018, all related pleadings, and the evidence and arguments presented on March 15, 2019.

*Arbitration*

This court embraces the fact that arbitration agreements are favored. Such favorable treatment is somewhat compromised in some cases when there are issues in the same matter that must be bifurcated, such as referring APSA claims to arbitration and retaining wrongful death claims to be litigated. But the concern about bifurcation is not, by itself, a basis to ignore a valid agreement to arbitrate claims. Rather, the focus is on whether there is a valid arbitration agreement.

*Procedure for Determination/Summary of Record*

The issue of whether a valid arbitration agreement exists through agency should be 'summarily' addressed by the trial court, and that requires that "the court initially determines whether material issues of fact are disputed and, if such factual disputes exist, then conducts an

expedited evidentiary hearing to resolve the dispute." *Ruesga v Kindred Nursing Centers*, L.L.C., 215 Ariz. 589, 596, 161 P.3d. 1253, 1260 (2007) and as codified in ARS Section 12-1502. As this court previously determined, there were factual issues that had to be resolved in order to decide the issue.

*Underlying Facts/Findings*

Milris Shook ("Ms. Shook") was admitted into Osborn for skilled nursing care and rehabilitation on March 18, 2014. Five days later, on March 23, 2014, Ms. Shook's daughter, Andeanna Farnes ("Ms. Farnes") executed documents prepared by Osborn ("Agreements"), both of which were arbitration agreements and they form the basis for this proceeding. For the record, these Agreements are Exhibit 8 to this proceeding. It is a stipulated fact that Ms. Shook did not sign either Agreement, and both were signed by her daughter "for" Ms. Shook.

At the evidentiary hearing, Dr. Michael Smith testified. He was offered to provide an opinion as to whether Ms. Shook had the capacity to confer authority upon her daughter to enter into the Agreements.

As a threshold finding, Dr. Smith possesses the requisite expertise in order to present opinions of the issue before the court. Per his testimony, he reviewed a fairly significant amount of documents and relied upon that review to formulate his opinions. He has acknowledged that there are "challenges" presented in making assessments as to cognitive functioning through only a review of records but that has not interfered with his overall ability to make this assessment.

Dr. Smith opined that Ms. Shook was not sufficiently functioning on a "cognitive level" at the time she may have conferred authority upon her daughter in late March of 2014. Dr. Smith provided the basis for his opinion, including citing records from the facility that Ms. Shook was residing at immediately before being admitted at Osborn. He further testified that at the time of admission, Ms. Shook was confused as to time and space, had slurred speech and had been diagnosed as suffering from aphasia, a condition that goes to the root of her ability to understand or communicate about certain concepts. Further, Ms. Shook suffered from dementia and had two strokes. Dr. Smith maintains that this alone would be enough to conclude that the level of "cognitive disability" was quite significant. He testified that the record is "replete" with entries relating to cognitive limitations. In total, is it his opinion that in late March, 2014, Ms. Shook was a "severely impaired individual."

Dr. Smith's findings and opinions are not without question or limitation. He relied heavily on records from March 18 and 19, 2014. Yet the execution of the Agreements occurred on or about March 23, 2014. It is therefore plausible that Ms. Shook's cognitive functioning and her ability to knowingly confer authority could have changed over the days leading up to her

daughter's signing of the Agreements. It is also noted that there are other records that suggest periods of higher cognitive functioning while at Osborn following Ms. Shook's admission to the facility.

But there is one major problem with this position espoused by Osborn. To the extent that Ms. Shook conferred authority upon her daughter, it appears to have occurred on the day of her admission, not on March 23, 2014, the day in which the Agreements were signed. Therefore, even if her condition improved from March 18 (date of admission) to March 23 (date on which Ms. Farnes signed the Agreements), Osborn has presented no evidence that there was a re-conferring of authority by Ms. Shook on or about March 23, 2014. Osborn is therefore bound by the evidence of Ms. Shook's condition at admission, and that evidence places Ms. Shook's cognitive functioning very must at question.

Dr. Smith acknowledged that there are challenges presented in making assessments of this nature through only a review of records. He seemed to give far less weight to records from Osborn that post-date the critical dates herein and suggest higher levels of cognitive functioning (there are a number of entries that reference that Ms. Shook was "oriented x 3"). Lastly, he appears not to have reviewed the records of Dr. Tomas, who was Ms. Shook's treating physician as of late March, 2014.

The court has also accounted for the fact that with dementia patients, they are often encouraged to maintain as much autonomy as possible, including making decisions for themselves to whatever level remains within their capacity. However, that is a treatment protocol, not evidence of cognitive functioning.

Having accounted for the facts that counter Dr. Smith's opinions, the court does not find variations as to day to day orientation to be anywhere near as persuasive as Osborn argues. When there is reference to cognitive functioning being "x 2," "x 3" or even "x 4," the reference is to very basic details, such as date and location. A person can be aware of their surroundings and be able to answer those basic questions but still have cognitive deficits when addressing more complex matters, such as consideration of legal rights. A person can come out of anesthesia and know where they are and what day it is but would certainly not, then and there, be asked to make major, life-altering decisions.

The records submitted make references to Ms. Shook being alert. However, those same records include repeated references to her being confused. In fact, the floor nurse for Ms. Shook at Osborn, Leonard Cowell, found Ms. Shook to be disoriented upon admission (examples of the testimony appear in Exhibit 2, pages 15 and page 37).

Defendant cited example after example of Ms. Shook making her own decisions, such as refusing to get out of bed (exhibit 19, page 47) or refusing to attend certain medical appointments (exhibit 19, pages 46-47). Tacked on to these examples are references to testimony from Ms. Farnes that her mother was able to understand matters around her but needed time to communicate (exhibit 20) and that Ms. Farnes maintained that her mother made her own decisions (such as exhibit 19, page 90, lines 7-15). Once again, these examples are clearly insufficient to establish the level of cognitive functioning that would be required to establish agency from Ms. Shook to her daughter.

Osborn further notes that the admission records (Exhibit 18) indicate note that Ms. Farnes was the financially responsible party at the time of her mother's admission at Osborn. This fact does not present a sufficient link to establish that some form of agency was conferred upon Ms. Farnes.

Assuming that Ms. Shook had the capacity to confer authority upon her daughter, the court must focus on the events as they have been proven herein. Both parties acknowledge that the record is lacking in certain details. Ms. Kimberly Hutchens, who was involved in the admissions paperwork, including the Agreements, had no independent recollection of the events. Therefore, exhibit 16 is filled with standard and routine practices rather than specifics as to the events of March 18 through 23, 2014.

There is another curious fact regarding the testimony from Ms. Hutchens. When this court asked why the arbitration agreements were not signed on the day of admission, Defendant responded that there are times in which the person admitting a patient does not have all paperwork completed due to time constraints. In those circumstances, it would be the role of Ms. Hutchens to review the file on a "weekend day" to ensure it was complete. If not complete, Ms. Hutchens' general procedure would be to complete the paperwork.

March 23, 2014 was a Sunday. This was the day Ms. Hutchens had Ms. Farnes sign the Agreements. It is possible that Ms. Hutchens was also involved in filling out admission documents on March 18, 2014, but that has not been established as a fact. If someone other than Ms. Hutchens handled the March 18, 2014 admission, Ms. Hutchens would not have been present when Ms. Shook allegedly conferred authority upon her daughter. It would therefore not have been reasonable for her to rely upon the March 18, 2014 direction allegedly given by Ms. Shook to her daughter in having Ms. Farnes execute documents on March 23, 2014.

There is also great room for debate as to what authority was conferred from Ms. Shook to Ms. Farnes, assuming Ms. Shook had to capacity to confer the authority. The operative phrase used by Ms. Shook was to the effect of "you do it," meaning that she was asking her daughter to attend to her admission. In assessing this issue, the court is very much persuaded by the rationale

detailed in *Kindred Healthcare, Inc. v Henson,* 481 S.W. 3d. 825, 830 (Kentucky, 2014) and *Gentry v Beverly Enterprises-Georgia, Inc.*, 714 F. Supp. 2d. 1225, 1228 (Georgia, 2009).

In both cases cited by Plaintiff, the principal directed a third party to take care of admission records. In *Kindred*, it was the principal's child who was directed. In *Gentry*, it was the principal's husband who was told to "take care of it." As has been noted through the holdings in *Ruesga*[1] and *Escareno,*[2] there is a higher burden of proof applied to the proponent of agency when the purported agent is the child rather than the spouse of the principal. Here, that higher burden of proof would apply as Ms. Farnes was the child of Ms. Shook.

After viewing this matter from its various vantage points, the court concludes that Defendant has failed to meet its burden of proof. First, this court cannot conclude that Ms. Shook possessed the sufficient cognitive functioning in order to make a knowing conferring of agency upon Ms. Farnes. Given Osborn's own observations of Ms., Shook at the time of admission, there is no basis to conclude that there was apparent authority upon which Osborn could reasonably rely. As stated in *Escareno v Kindred Nursing Centers West, LLC*, 239 Ariz. 126, 130, 366 P.3d. 1016, 1020 (2016), this form of agency authority arises when "the principal has intentionally or inadvertently induced third person to believe that such a person was his agent although no actual or express authority was conferred on his as agent." There is nothing from the actions of Ms. Shook that would allow Osborn to conclude or rely that she had conferred agency powers upon his daughter.

If the court were to conclude that Ms. Shook possessed sufficient cognitive functioning to confer authority upon her daughter, the nature of the alleged conferring was wholly inadequate to establish that there was agency for the purposes alleged herein; that being, to execute arbitration agreements.[3] The Agreements were not a condition of admission or treatment. Arbitration agreements are not considered part of the routine paperwork upon admission to a hospital or care facility. There is no evidence that anyone from Osborn explained in Ms. Shook's presence that the admission documents included anything more than commonly understood paperwork. It is an untenable leap for Osborn to claim that by telling her daughter to take care of it or handle it, Ms. Shook made a knowing assignment of decision-making regarding legal rights, if she understood at all what was occurring.

---

[1] *Ruesga v Kindred Nursing Centers*, L.L.C., 215 Ariz. 589, 597, 161 P.3d. 1253, 1261 (2007)

[2] *Escareno v Kindred Nursing Centers West, LLC*, 239 Ariz. 126, 130, 366 P.3d. 1016, 1020 (2016)

[3] The court notes that the existence of a Health Care Power of Attorney would not be a basis to conclude that Ms. Shook conferred authority upon her daughter to address non-health care related decisions, such as future addressing of legal rights. Case law supports this conclusion. Therefore, if Osborn were to further develop this aspect of their claim, it would still fall short.

*Unconscionability Claims*

Given the findings above, this court does no reach the unconscionability claims asserted by Plaintiff. Even if certain terms were found to be unconscionable, the cure would be through severance of those terms, not through relieving Plaintiff from the contract.

*Order*

Based upon the foregoing and having found that agency did not exist for the Agreements to be enforced,

**IT IS ORDERED denying Defendants' October 4, 2017 Motion To Compel Arbitration.**

# APPENDIX 2

Clerk of the Superior Court
*** Electronically Filed ***
03/28/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-053385 03/26/2019

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
W. Tenoever
Deputy

SUSAN SHOOK MARY E REILLY

v.

RENEWCARE OF SCOTTSDALE INC, et al. MICHAEL J RYAN

JUDGE BRUCE COHEN

**DENIAL OF MOTION FOR RECONSIDERATION**

The court has reviewed Defendants' Motion For Reconsideration filed on March 22, 2019. For the purpose of this motion only, the court will assume as fact the assertions made by Defendants in their motion for reconsideration. The effect such would have would be to perhaps eliminate concerns over how the events of March 18, 2014 impacted the signing of the agreement to arbitrate executed on March 23, 2014. The Court will therefore assume that Ms. Hutchens engaged in some kind of discussion with Mr. Shook on March 23, 2014 during which Ms. Shook directed her daughter to take care of it for her.

Even with this assumption, Defendants fail to meet their burden of proof to establish any sort of agency on the part of Ms. Shook's daughter that would allow her to waive legal rights in the event of a dispute. The fact that Defendant is relying upon "custom and practice" of Ms. Hutchens to determine the scope of authority conferred only further undermines the position of Defendant.

As for the alleged misapplication of holdings from other courts, this court considered such holdings and the rationale for the same but, in the end, ruled based upon the assignment of burden of proof. Plain and simple, Defendant failed to carry its burden of proof that Ms. Shook had conferred upon her daughter the authority to enter into the arbitration agreement. This conclusion was reached after considering the totality of the evidence and arguments presented. Under no

circumstances was this ruling intended to imply that arbitration agreements are to be subjected to "suspect status" or that agreements of this nature are inherently unconscionable.

**IT IS ORDERED affirming this court's ruling of March 18, 2019 and denying Defendant's Motion For Reconsideration.**

# APPENDIX 3

2018 WL 615106
Only the Westlaw citation is currently available.
THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1);
Ariz. R. Civ. App. P. 28(a)(1), (f).
Court of Appeals of Arizona, Division 2.

Jeannette YAZEDJIAN, personal representative of the Estate of Harriette Patterson, on behalf of the Estate of Harriette Patterson, deceased; and Jeannette Yazedjian, individually and on behalf of Harriette Patterson's statutory beneficiaries pursuant to A.R.S. § 12–612(A), Plaintiff/Appellee,
v.
ARC SANTA CATALINA INC., a Tennessee Corporation, dba La Rosa Health Care Center at Santa Catalina Villas; American Retirement Corporation, a Tennessee corporation; Brookdale Senior Living Communities Inc., a Delaware corporation; Brookdale Senior Living Inc., a Delaware corporation; and Richard W. Park, Administrator, Defendants/Appellants.

No. 2 CA–CV 2017–0045
|
Filed January 29, 2018
|
Review Denied September 25, 2018

Appeal from the Superior Court in Pima County; No. C20152591; The Honorable Leslie Miller, Judge. **AFFIRMED**

**Attorneys and Law Firms**

Law Office of Scott E. Boehm, P.C., Phoenix, By Scott E. Boehm and Wilkes & McHugh, P.A., Scottsdale, By Melanie L. Bossie and Mary Ellen Spiece, Counsel for Plaintiff/ Appellee

Quintairos, Prieto, Wood & Boyer, P.A., Phoenix, By Anthony J. Fernandez, Vincent J. Montell, and Rita J. Bustos, Counsel for Defendants/Appellants

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

**MEMORANDUM DECISION**

VÁSQUEZ, Presiding Judge:

***1** ¶ 1 ARC Santa Catalina Inc., doing business as La Rosa Health Care Center at Santa Catalina Villas; American Retirement Corporation; Brookdale Senior Living Communities Inc.; Brookdale Senior Living Inc.; and Richard W. Park (collectively "La Rosa") appeal from the trial court's order denying both its motion to compel arbitration of a claim brought under the Adult Protective Services Act (APSA) by Jeannette Yazedjian as personal representative of the Estate of Harriette Patterson and on behalf of the decedent's statutory beneficiaries, and a subsequent motion to reconsider that denial. On appeal, La Rosa argues that the arbitration agreement signed by Yazedjian is enforceable because she was authorized to sign it on Patterson's behalf. For the following reasons, we affirm.

**Factual and Procedural Background**

¶ 2 We view the facts in the light most favorable to upholding the trial court's order.[1] *Escareno v. Kindred Nursing Ctrs. W., L.L.C.*, 239 Ariz. 126, ¶ 2, 366 P.3d 1016 (App. 2016). Before the fall of 2009, Patterson lived in a senior living center called Amber Lights. Her husband preceded her in death, and she had no children. Her only living relative was her brother, Roger Rogers, who resided in Florida and had difficulty traveling due to his own and his wife's health problems. As Patterson's health deteriorated, and because she lacked any nearby family, her healthcare was coordinated and facilitated by a local company called Caring Cooperatives.

¶ 3 Yazedjian is an attorney based and licensed in California. In 2006 or 2007, Rogers contacted Yazedjian's office, seeking help on Patterson's behalf with some "tax issues."[2] Yazedjian assisted Patterson on those issues, and soon thereafter also undertook estate-planning matters and established a "client trust fund" for Patterson. She also assisted with Patterson's finances and ensured that her "bills were paid and that her financial needs were being met." Rogers and Caring Cooperatives kept Yazedjian informed of Patterson's health,



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but she was not involved in making any healthcare decisions for Patterson.

¶ 4 In 2009, Patterson's health declined further, and, in June, she was diagnosed with "moderate to severe deficits in cognition" and dementia. Both Amber Lights and Caring Cooperatives recommended moving her to a facility more capable of meeting her needs.

***2** ¶ 5 Patterson was admitted to La Rosa in October 2009. Yazedjian signed the admission paperwork. That paperwork included a "Binding Arbitration Agreement," which provided, in part: "[C]laims, controversies, disputes, or tort action arising out of or relating in any manner to the treatment or delivery of services by us to you during your stay at [La Rosa], shall be submitted to binding arbitration, which shall be conducted as provided in this Agreement." It additionally provided, "If you choose not to enter into this Agreement, you will not be denied residency for that reason alone." Yazedjian signed the agreement and, next to her signature, added "on behalf of Harriette Patterson."

¶ 6 Patterson died in May 2014. The following year, Yazedjian, as Patterson's personal representative, filed this civil lawsuit against La Rosa alleging negligence, APSA violations, and wrongful-death claims. La Rosa filed a motion to compel arbitration of the APSA claim pursuant to the arbitration agreement. Yazedjian's arguments in response included that she lacked authority to sign the agreement on Patterson's behalf and it was therefore unenforceable. Following a hearing, the trial court denied La Rosa's motion in an unsigned order, finding Yazedjian "lacked the authority to sign the agreement to arbitrate."

¶ 7 The case progressed, and both parties began discovery. La Rosa later filed a motion for reconsideration of the denial of its motion to compel arbitration based on newly discovered evidence relevant to Yazedjian's authority as Patterson's agent; specifically, that Yazedjian and Patterson had an attorney-client relationship beginning in 2007, which, it contended, was not limited in scope. It thus argued that Patterson had "provided actual express authority for ... Yazedjian to act on her behalf when she hired her as an attorney." It further asserted that Yazedjian also had "actual implied authority" based on her "history of acting as Harriette Patterson's agent prior to her admission to La Rosa."

¶ 8 Yazedjian responded that her scope of representation was limited to tax issues and estate planning and did not encompass authority to bind Patterson to an arbitration agreement. She further argued there was no evidence she had acted as Patterson's general agent before her admission to La Rosa and, thus, had no implied authority. The trial court denied La Rosa's motion, again in an unsigned order, finding it had "provide[d] no evidence that ... Yazedjian had Power of Attorney that permitted her to sign the Agreement in question on [Patterson's] behalf and waive her right to litigation." Pursuant to the parties' stipulation, the court entered a final, signed order denying La Rosa's motion to compel arbitration and its motion to reconsider. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12–2101.01(A)(1). *See Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶¶ 11, 26, 380 P.3d 659 (App. 2016).

**Discussion**

¶ 9 La Rosa argues the trial court erred by denying its motion to compel arbitration and its motion to reconsider that denial because Yazedjian had actual authority to sign the arbitration agreement. [3] The existence of agency is generally a question of fact. *Escareno*, 239 Ariz. 126, ¶ 6, 366 P.3d 1016. But because the parties do not dispute the material facts, we review de novo whether such a relationship existed. *See id.*

***3** ¶ 10 Although arbitration agreements cover a specific topic—an agreement to arbitrate certain disputes—they are a form of contract and consequently "subject to the same defenses to enforceability as any other contract." *Duenas v. Life Care Ctrs. of Am., Inc.*, 236 Ariz. 130, ¶ 6, 336 P.3d 763 (App. 2014); *see* A.R.S. § 12–3006(A) (arbitration agreements "valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract"); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, ––– U.S. ––––, 137 S.Ct. 1421, 1424, 197 L.Ed.2d 806 (2017) (arbitration agreements "on equal footing with all other contracts"), *quoting DIRECTV, Inc. v. Imburgia*, ––– U.S. ––––, 136 S.Ct. 463, 465, 193 L.Ed.2d 365 (2015). A defendant seeking to enforce a contract must show the plaintiff accepted the terms of the agreement. *See Escareno*, 239 Ariz. 126, ¶ 7, 366 P.3d 1016; *see also Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, ¶ 7, 270 P.3d 852 (App. 2011) ("For a valid contract to have been formed between them, there must have been an offer, acceptance of the offer, and consideration ...."). Or, as relevant here, that the person who signed the contract was "in fact ... the plaintiff's agent and, thus, had authority to do so." *Escareno*, 239 Ariz.



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126, ¶ 7, 366 P.3d 1016; *see Goodman*, 229 Ariz. 25, ¶ 11, 270 P.3d 852.

¶ 11 "Actual authority 'may be proved by direct evidence of express contract of agency between the principal and agent or by proof of facts implying such contract or the ratification thereof.' " *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 29, 161 P.3d 1253 (App. 2007), *quoting Corral v. Fid. Bankers Life Ins. Co.*, 129 Ariz. 323, 326, 630 P.2d 1055 (App. 1981). This "includes both express authority outlined in specific language, and implied authority when the agent acts consistently with the agent's 'reasonable interpretation of the principal's manifestation in light of the principal's objective and other facts known to the agent.' " *Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, ¶ 26, 269 P.3d 678 (App. 2011), *quoting Ruesga*, 215 Ariz. 589, ¶ 29, 161 P.3d 1253.

¶ 12 We find *Escareno* particularly instructive. In that case, the decedent's son had signed an arbitration agreement on his mother's behalf when she was admitted to an assisted-living facility. 239 Ariz. 126, ¶¶ 2–3, 366 P.3d 1016. At that time, his mother suffered from "encephalopathy, cognitive deficits, and a 'severe case of dementia.' " *Id.* ¶ 2. The undisputed evidence in this case similarly demonstrates that Patterson likely was unaware Yazedjian had signed the arbitration agreement and was incapable of understanding Yazedjian's actions in such a way as to either give her consent or contest them. As we noted above, Patterson was diagnosed with "moderate to severe deficits in cognition" and dementia prior to her admission at La Rosa.

¶ 13 Moreover, Yazedjian testified that Patterson did not want to leave Amber Lights, and she and Caring Cooperatives "trick[ed] her into moving" by "arrang[ing] for [Patterson] to be out for a number of hours" while they moved her belongings from Amber Lights to La Rosa. "[W]hen [they] brought her to La Rosa, [Patterson] said, 'I want to go home.' " Although Yazedjian stated that one of her responsibilities as Patterson's attorney was to keep Patterson "reasonably informed of what [she did] on [Patterson's] behalf," she clarified that "[i]f you are asking me specifically about the agreements for admission to La Rosa, it was a very different situation." Indeed, the move to La Rosa—a facility which was recommended by Caring Cooperatives—was prompted by Patterson's need for more "hands on care" due to her declining cognitive abilities.

¶ 14 This evidence demonstrates that Yazedjian was aware she was, in fact, acting against Patterson's wishes when she signed La Rosa's admission forms, including the arbitration agreement, despite having acknowledged she signed them as Patterson's attorney. *See Escareno*, 239 Ariz. 126, ¶ 11, 366 P.3d 1016 ("[I]t is well settled that the declarations of an agent are insufficient to establish the fact or extent of his authority."), *quoting Jolly v. Kent Realty, Inc.*, 151 Ariz. 506, 512, 729 P.2d 310 (App. 1986); *cf. Ruesga*, 215 Ariz. 589, ¶ 29, 161 P.3d 1253 (implied authority exists when agent acts "in a manner in which an agent believes the principal wishes the agent to act"), *quoting* Restatement (Third) of Agency (hereinafter "Restatement") § 2.01 cmt. b. Under those circumstances, Patterson's failure to expressly contest Yazedjian's action of signing the agreement does not constitute a manifestation of her assent, particularly given that Patterson likely did not know Yazedjian had even taken the action. *See* Restatement § 1.03 cmt. b; *see also Escareno*, 239 Ariz. 126, ¶ 12, 366 P.3d 1016; *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721, 740 (Md. 2010) (agent's authority to make "general legal decisions" did not extend to signing arbitration agreement where principal was "unaware" agent had done so and thus "never had an opportunity to object to that action").

***4** ¶ 15 La Rosa argues, however, that Yazedjian "had a history of acting as [Patterson's] agent prior to her admission to La Rosa," which Patterson did not contest. *See Ruesga*, 215 Ariz. 589, ¶¶ 19, 35–36, 161 P.3d 1253; *see also* Restatement § 1.03 cmt. b ("Silence may constitute a manifestation [of assent] when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence."). As support, it notes that Yazedjian toured La Rosa prior to Patterson's move, helped move Patterson into La Rosa, sorted through Patterson's paperwork that was in storage, hired Patterson's caregivers, and would "regularly" call and visit Patterson to "check up on her."[4] However, all of these factors focus on Yazedjian's conduct, not Patterson's. They do not support a finding of express authority—that Patterson "has stated in very specific or detailed language." *Ruesga*, 215 Ariz. 589, ¶ 29, 161 P.3d 1253, *quoting* Restatement § 2.01 cmt. b. Nor do they support a finding of " 'implied authority'—when an agent has actual authority 'to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objective and other facts known to the agent.' " *Ruesga*, 215 Ariz. 589, ¶ 29, 161 P.3d 1253, *quoting* Restatement § 2.01 cmt. b. These factors only reflect

"a pattern of care-giving alone," and one that increased as Patterson's cognitive abilities declined. *See Escareno*, 239 Ariz. 126, ¶¶ 12, 16, 366 P.3d 1016. Nothing in those facts constitutes circumstantial evidence that Patterson manifested her assent to Yazedjian's authority to sign the arbitration agreement on her behalf. *See id.* ¶ 13; Restatement § 2.02 (scope of actual authority).

¶ 16 Again, our reasoning is supported by *Escareno*. In that case, the son had begun helping his mother with her financial matters two years before she was moved into the nursing home by transferring money from her account to pay her bills. *Escareno*, 239 Ariz. 126, ¶¶ 2, 12–13, 366 P.3d 1016. He additionally assisted her at medical appointments by filling out and signing paperwork for her when she was unable to do so. *Id.* ¶ 14. In addressing whether the son had authority to sign the agreement, we determined there was no evidence of affirmative actions on his mother's behalf showing she had manifested assent to the assistance. *Id.* ¶¶ 13, 15. We concluded that the son's acts of helping with his mother's finances and medical appointments were insufficient circumstantial evidence that the son had actual authority to sign the arbitration agreement on his mother's behalf. *Id.* ¶ 16. We further explained that because the elderly generally "rely on others to meet their needs as their health deteriorates[,] ... a pattern of care-giving alone is insufficient to create an agency relationship, particularly in the absence of any evidence showing a manifestation of assent on the part of the elderly person." *Id.* ¶ 16.

¶ 17 The evidence in this case similarly shows that Yazedjian's role in Patterson's life before her admission at La Rosa was primarily limited to assisting Patterson with her finances —although not making financial decisions on Patterson's behalf[5] —and representing her for tax and estate-planning purposes. Accordingly, any authority Yazedjian may have had related to those areas did not extend to signing the arbitration agreement. *See id.* ¶ 13; *see also Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 594 (Ky. 2012) ("[A]n optional nursing home arbitration agreement does not involve a financial decision within the authority of an agent authorized to manage his or her principal's property and finances."); *Dickerson*, 995 A.2d at 736 (authority to make healthcare and financial decisions on principal's behalf does not extend to decision to sign arbitration agreement as part of admission to nursing home). In sum, the evidence shows that Patterson did not authorize Yazedjian to sign the arbitration agreement and that her "acts and conduct" did not imply Yazedjian had such authority. *Phx. W. Holding Corp. v. Gleeson*, 18 Ariz. App. 60, 66, 500 P.2d 320 (1972); *see also* Restatement § 2.01 & cmt. b (defining "express" and "implied" authority).

***5** ¶ 18 La Rosa further argues that Yazedjian had express authority to sign the agreement "[b]ased on the scope of [Yazedjian's] authority as [Patterson's] attorney." It contends that Patterson never expressly limited the scope of Yazedjian's representation and, in an attorney-client relationship, there is a "presumption of authority." *See Garn v. Garn*, 155 Ariz. 156, 160, 745 P.2d 604 (App. 1987) (attorney acting within scope of representation "is clothed with the presumption of authority to represent his or her client").

¶ 19 La Rosa, however, overstates the scope of an attorney's authority when representing a client. "An attorney is not ... a general agent for a client and there are limitations on his or her power to act on behalf of a client." *Id.* The scope of an attorney's authority "is governed by the law of agency," *id.*, and is limited to those actions "designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives," Restatement § 2.02(1); *see* Restatement (Third) of the Law Governing Lawyers § 26 (2000) (hereinafter "Restatement (Third) of Lawyers") (attorney has actual authority to act on client's behalf when, inter alia, "client has expressly or impliedly authorized the act"); *see also Rotary Club of Tucson v. Chaprales Ramos de Pena*, 160 Ariz. 362, 365, 773 P.2d 467 (App. 1989) (finding attorney not authorized to act as client's authorized agent to receive service "solely by reason of his capacity as attorney"). As discussed above, the record in this case contains no evidence that Patterson expressly or implicitly authorized Yazedjian to sign the arbitration agreement, which would have been outside the scope of Yazedjian's established authority as Patterson's tax and estate-planning attorney. Accordingly, La Rosa's reliance on Patterson and Yazedjian's attorney-client relationship is misplaced.

¶ 20 La Rosa additionally contends that, even if Yazedjian did not have authority when she signed the arbitration agreement, Patterson subsequently ratified that action by granting Yazedjian a healthcare power of attorney after her admission. *See* Restatement (Third) of Lawyers §§ 21(4) ("A client may ratify an act of a lawyer that was not previously authorized."), 26(3) (lawyer's act considered that of client when client ratifies act); *see also* Restatement (Second) of Agency § 416 (1958). La Rosa did not, however, raise this argument below and has therefore waived it for review. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18, 169



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P.3d 120 (App. 2007); *see also* *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 20, 235 P.3d 285 (App. 2010) (this court will not presume argument raised during hearing when appellant fails to provide transcripts). Moreover, the healthcare power of attorney limited Yazedjian to making "health care decisions for [Patterson] when [she could not] make or communicate" those decisions herself. Whether to sign a nursing home's optional arbitration agreement is not a healthcare decision.[6] *See* *Fiala v. Bickford Senior Living Grp., LLC*, 392 Ill.Dec. 80, 32 N.E.3d 80, ¶ 44 (Ill. App. Ct. 2015) (An "agent acting pursuant to a health-care power of attorney is not authorized to sign the [optional] arbitration provision and the patient cannot be bound by the agent's action."); *Ping*, 376 S.W.3d at 593 (when arbitration agreement is optional condition of admission to nursing home, "authority to choose arbitration is not within the purview of a health-care agency"); *Dickerson*, 995 A.2d at 737 (decision to sign arbitration agreement is decision about how to resolve legal disputes, not healthcare matters); *Koricic v. Beverly Enters.—Nebraska, Inc.*, 278 Neb. 713, 773 N.W.2d 145, 148, 151 (Neb. 2009) (son's authority to admit mother to long-term care facility and make healthcare decisions "did not extend to signing an [optional] arbitration agreement"); *Primmer v. Healthcare Indus. Corp.*, 43 N.E.3d 788, ¶ 19 (Ohio Ct. App. 2015) ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement."). Yazedjian's actions were thus outside the scope of any purported authorization Patterson later may have granted her.[7]

### Disposition

***6** ¶ 21 For the foregoing reasons, we affirm the trial court's order.

### All Citations

Not Reported in Pac. Rptr., 2018 WL 615106

Footnotes

1 Neither party requested, nor did the trial court provide, findings of fact or conclusions of law in this case. "In the absence of express findings of fact, we must presume the trial court found every controverted issue of fact necessary to sustain the judgment, provid[ed] there was evidence in the record to support the same." *Helfenbein v. Barae Inv. Co.*, 19 Ariz. App. 436, 440, 508 P.2d 101 (1973).

2 Yazedjian's office had previously handled estate planning for Patterson's sister and her sister's husband. Patterson's sister had died and, later, following the death of her husband, "a number of trusts were set up." Patterson was a designated beneficiary of those trusts. Because Yazedjian had assisted in administering the trusts, she was already familiar with Patterson.

3 In its opening brief, La Rosa contends that Yazedjian also had apparent authority to sign the arbitration agreement. *See* *Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, ¶ 26, 269 P.3d 678 (App. 2011) (agent may have actual or apparent authority to act). It did not, however, meaningfully raise this argument below and, instead, relied on a theory of actual authority. Moreover, it does not appear the trial court's ruling was based on a theory of apparent authority. Additionally, La Rosa has not provided the transcript of the hearing held on its initial motion to compel arbitration. *See* Ariz. R. Civ. App. P. 11(c) (appellant responsible for providing all relevant transcripts); *see also* *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 20, 235 P.3d 285 (App. 2010). Thus we presume the missing transcript supports the trial court's ruling. *Varco, Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, ¶ 14, 393 P.3d 946 (App. 2017). We therefore do not address La Rosa's argument regarding apparent authority. *See* *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18, 169 P.3d 120 (App. 2007) (court of appeals generally does not consider arguments raised for first time on appeal); *see also* *Ramsey*, 225 Ariz. 132, ¶ 20, 235 P.3d 285 (appellate court will not presume argument raised during hearing when appellant fails to provide transcripts).

4 La Rosa also points out that Yazedjian "participate[d] in care conferences." This participation, however, occurred after Patterson was admitted to La Rosa and after Patterson had executed the healthcare power of attorney in favor of Yazedjian. It therefore does not inform our analysis of whether Yazedjian had authority to sign the arbitration agreement on Patterson's behalf at the time of her admission to La Rosa. Moreover, even if it were relevant, the authority to make healthcare decisions does not extend to the authority to enter into an optional nursing home arbitration agreement. *See* *Dickerson*, 995 A.2d at 737 ("[T]he decision to sign an arbitration agreement is a decision concerning the legal rights of the parties to the agreement about how to resolve their legal disputes, not a health care decision.").

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5 Despite Yazedjian's role in managing Patterson's finances, she did not make "any decisions for [Patterson] without checking with [Rogers] first," as he was the trustee of the trust established for Patterson.

6 We recognize that in *Ruesga* we determined the wife had authority to sign an optional arbitration agreement on her husband's behalf based, in part, on her history of making healthcare-related decisions for her husband. 215 Ariz. 589, ¶¶ 2–5, 35, 161 P.3d 1253. We also noted in that case, however, that "the degree of proof required to establish and define the agency relationship" between spouses is lower than non-spouses. *Id.* ¶ 33, *quoting* *State Farm Mut. Auto. Ins. Co. v. Long*, 16 Ariz. App. 222, 225, 492 P.2d 718 (1972). Furthermore, because the scope of the wife's authority had not been raised by either party, and they instead focused on whether the wife had *any* authority to make decisions on her husband's behalf, this court had no reason to address that issue. *Id.* ¶¶ 17, 23, 31 & n.6. Consequently, *Ruesga* does not control the issue of the scope of Yazedjian's authority even if she had authority to make Patterson's healthcare decisions.

7 Because we conclude Yazedjian lacked authority to sign the arbitration agreement, we do not address La Rosa's alternative argument that the trial court erred "by holding that [Yazedjian] required an express power of attorney to waive [Patterson's] alleged right to litigation." *See* *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538 (App. 2006) (court of appeals may affirm trial court "if it is correct for any reason apparent in the record"). Similarly, we do not address Yazedjian's alternative arguments that the agreement was unconscionable and unenforceable due to certain American Arbitration Association rules.

**End of Document**

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# APPENDIX 4

2015 WL 3551874
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NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona,
Division 1.

Phillip HURST, Personal Representative of the Estate of Frances M. Hurst, on behalf of the Estate of Frances M. Hurst, and Phillip Hurst, Personal Representative, on behalf of Frances M. Hurst's statutory beneficiaries pursuant to A.R.S. Section 12–612(A), Plaintiff/Appellee,
v.
SILVER CREEK INN, L.L.C., a California limited liability company dba Silver Creek Leisure Living; Silver Creek Inn Assets, L.L.C., a California limited liability company; Silver Creek Inn Corporation, a California corporation; Silver Creek Inn General Partner, a California general partnership; Renee Fleminks, manager, Defendants/Appellants.

No. 1 CA–CV 14–0338.
|
June 4, 2015.

Appeal from the Superior Court in Mohave County; No. S8015CV201300871; The Honorable Lee Frank Jantzen, Judge. AFFIRMED.

**Attorneys and Law Firms**

Wilkes & McHugh, P.A., Phoenix By Melanie L. Bossie, Donna Y. Oh, Co–Counsel for Plaintiff/Appellee.

Law Office of Scott E. Boehm, P.C., Phoenix By Scott E. Boehm, Co–Counsel for Plaintiff/Appellee.

Jones Skelton & Hochuli, P.L.C., Phoenix By Jay P. Rosenthal, Douglas R. Cullins, Jonathan Paul Barnes, Jr., Counsel for Defendants/Appellants.

Presiding Judge MARGARET H. DOWNIE delivered the decision of the Court, in which Judge KENTON D. JONES and Judge JON W. THOMPSON joined.

**MEMORANDUM DECISION**

DOWNIE, Judge.

***1** ¶ 1 Silver Creek Inn Assets, L.L.C., Silver Creek Inn, L.L.C. dba Silver Creek Leisure Living, Silver Creek Inn Corporation, Silver Creek Inn General Partner, and Renee Fleminks (collectively, "Silver Creek") appeal from the superior court's denial of their motion to compel arbitration. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶ 2 In September 2009, Phillip Hurst accompanied his mother, Frances Hurst ("Mother"), to a Silver Creek assisted living facility, where she was admitted as a resident. Hurst signed several documents at the time of Mother's admission to Silver Creek, including:

- Residency Agreement
- Addendum of Informed Choice
- Acknowledgment of Receipt
- Arbitration Agreement
- Medical History
- Resident Service Plan
- Notice of Privacy Practices

¶ 3 On some of the documents, Hurst wrote "P.O.A." after his signature, though he does not recall obtaining a power of attorney for Mother. Hurst signed other documents containing various pre-printed designations, including "Resident or Resident' [sic] Representative," "Responsible Party on Behalf of Resident," "Resident's Representative," and "Responsible Party."

¶ 4 Mother left Silver Creek and moved to a different care facility ("Legacy") in April 2010, where she resided until her death in August 2011. As personal representative of Mother's estate, Hurst sued Silver Creek and several Legacy-related entities, asserting claims under the Adult Protective Services Act ("APSA") and, as to the Legacy defendants, wrongful death.



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¶ 5 Silver Creek moved to compel arbitration, which Hurst opposed. After briefing and oral argument, the superior court denied the motion. Silver Creek unsuccessfully sought reconsideration. After the court entered a signed judgment denying the motion to compel arbitration, Silver Creek timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12–2101.01(A)(1).

**DISCUSSION**

¶ 6 Silver Creek contends Hurst had actual or apparent authority to sign the Arbitration Agreement on Mother's behalf, or, alternatively, that the superior court should have held an evidentiary hearing to ascertain his authority. The validity and enforceability of an arbitration agreement is a mixed question of fact and law that we review *de novo*. *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.,* 234 Ariz. 18, 20, ¶ 9, 316 P.3d 607, 609 (App.2014).

¶ 7 An arbitration agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A.R.S. § 12–1501; *U.S. Insulation, Inc. v. Hilro Constr. Co.,* 146 Ariz. 250, 256, 705 P.2d 490, 496 (App.1985). When a party denies the existence of an enforceable agreement to arbitrate, the court "shall proceed summarily to the determination of the issue so raised." A.R.S. § 12–1502(A). "[C]ourts have repeatedly analogized a trial court's duty in ruling on a motion to compel arbitration [with] its duty in ruling on a motion for summary judgment." *Ruesga v. Kindred Nursing Ctrs., L.L.C.,* 215 Ariz. 589, 596, ¶ 23, 161 P.3d 1253, 1260 (App.2007). Proceeding summarily means that the trial court initially determines whether material issues of fact are disputed and, if so, the court conducts an evidentiary hearing to resolve the disputes. *Id.* at ¶ 24; *Brake Masters Sys., Inc. v. Gabbay,* 206 Ariz. 360, 365, ¶¶ 13–14, 78 P.3d 1081, 1086 (App.2003) (summary judgment standard appropriate in determining need for evidentiary hearing regarding existence or terms of arbitration agreement).

***2** ¶ 8 Absent a valid agency relationship, the Arbitration Agreement is not binding on Mother's estate. *See Bank of Douglas v. Robinson,* 78 Ariz. 231, 239, 278 P.2d 417, 422 (1954); *see also Ruesga,* 215 Ariz. at 596, ¶ 23, 161 P.3d at 1260. For purposes of this appeal, we accept, without deciding, Silver Creek's assertion that the superior court erroneously deemed Mother incompetent at the time of her admission to its facility. Even assuming Mother was competent, though, we affirm because, as a matter of law, no agency relationship existed based on the undisputed facts before the superior court. *See Ruesga,* 215 Ariz. at 595, ¶ 21, 161 P.3d at 1259 (when material facts not in dispute, determination of agency is a question of law for the court); *see also Ariz. Board of Regents v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm'r,* 160 Ariz. 150, 154, 771 P.2d 880, 884 (App.1989) (appellate court will affirm superior court's decision if it is correct for any reason).

**I.** Agency

¶ 9 Agency is the fiduciary relationship arising when one person (the principal) manifests assent to another person (the agent) that the agent act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act. Restatement (Third) of Agency § 1.01; *see also Perez v. First Am. Fit. Ins. Co.,* 810 F.Supp.2d 986, 992 (D.Ariz.2011) ("Arizona has adopted the definition of 'agency' embodied in the Restatement (Third) of Agency."). Agency may be established through either actual or apparent authority. Restatement (Third) of Agency §§ 2.01, 2.02; *see Goodman v. Physical Res. Eng'g, Inc.,* 229 Ariz. 25, 29, ¶ 12, 270 P.3d 852, 856 (App.2011). Actual authority may be express or implied. *Canyon State Canners v. Hooks,* 74 Ariz. 70, 72, 243 P.2d 1023, 1025 (1952).

**A. Actual Express Authority**

¶ 10 "An agent holds express authority if there is evidence that the principal has delegated authority by oral or written words which authorize him to do a certain act or series of acts." *Goodman,* 229 Ariz. at 29, ¶ 12, 270 P.3d at 856. Express authority "may be proved by direct evidence of express contract of agency between the principal and agent." *Ruesga,* 215 Ariz. at 597, ¶ 29,161 P.3d at 1261. " '[E]xpress authority' often means actual authority that a principal has stated in very specific or detailed language." Restatment (Third) of Agency § 2.01 cmt. b.

¶ 11 Nothing in the record suggests Mother gave express oral or written assent to Hurst's authority. Silver Creek contends actual express authority exists because Hurst signed the Arbitration Agreement on a line entitled "Responsible Party on Behalf of Resident." However, Hurst's conduct cannot establish an express delegation by Mother. *See Svcs. Holding Co. v. Transamerica Occidental Life Ins. Co.,* 180 Ariz. 198, 203, 883 P.2d 435, 440 (App.1994) ( "[T]he source of the authority, actual or apparent, is the principal."). Silver Creek



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has not claimed that Mother said anything at all about her son's authority to act on her behalf. Nothing in the record before the superior court created a question of fact about whether Hurst had actual express authority.

**B. Actual Implied Authority**

***3** ¶ 12 "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent to so act." Restatement (Third) of Agency § 2.01; *see also Ruesga,* 215 Ariz. at 597, ¶ 29, 161 P.3d at 1261. Although authority of this nature is implied, it is nonetheless dependent on manifestations by the principal:

> An implied agency must be based on facts for which the principal is responsible; they must, in the absence of estoppel, be such as to imply an intention to create the agency, and the implication must arise from a natural and reasonable, and not from a forced, strained, or distorted, construction of them. They must lead to the reasonable conclusion that mutual assent exists, and be such as naturally lead another to believe in and to rely on the agency.

*Canyon State Canners,* 74 Ariz. at 73, 243 P.2d at 1025.

¶ 13 Otherwise stated, "[t]he nature and extent of an agent's authority ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such or saying that he is one." *Phx. W. Holding Corp. v. Gleeson,* 18 Ariz.App. 60, 66, 500 P.2d 320, 326 (1972); *see also* Restatement (Third) of Agency § 2.01 cmt. c ("Actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action."). "A principal's unexpressed willingness that another act as agent does not create actual authority." Restatement (Third) of Agency § 3.01 cmt. b.

¶ 14 The record is silent regarding any words or conduct by Mother that manifested assent for Hurst to act as her agent. Contrary to Silver Creek's contention, her purported silence while Hurst signed various documents, including the Arbitration Agreement, is insufficient. *See id.* Nothing suggests Mother knew anything about the documents Hurst signed or made statements or gestures before, during, or after their signing that gave rise to an issue of fact regarding actual implied authority. Indeed, a declaration from Silver Creek manager Gerard Fleminks, submitted in support of the motion to compel arbitration, focuses only on *Hurst's* conduct and says nothing whatsoever about Mother's participation, conduct, or words.

¶ 15 Silver Creek's reliance on *Ruesga* is unavailing. Ruesga was admitted to a care center "in a severely compromised state" after suffering a stroke and heart attack; he "was virtually non-responsive." *Ruesga,* 215 Ariz. at 591, ¶ 2, 161 P.3d at 1255. Ruesga's wife ("Wife") signed a series of admission documents, including an arbitration agreement. *Id.* at 591–92, ¶¶ 3–4, 161 P.3d at 1255–56. Wife had no power of attorney, and Ruesga had not given her express authorization to sign the arbitration agreement. *Id.* at 592, ¶ 5, 161 P.3d at 1256. In subsequent litigation brought by Wife, the care center moved to compel arbitration. *Id.* at ¶ 6. The superior court granted the motion, and Wife appealed. *Id.* at 592–93, ¶¶ 6–7, 161 P .3d at 1256–57.

***4** ¶ 16 This Court affirmed, holding that Wife had actual implied authority to execute the arbitration agreement. *Id.* at 599–600, ¶¶ 36, 40, 161 P.3d at 1263–64. The care center had "produced several medical records that revealed a history of [Wife's] acting and making decisions on [Ruesga's] behalf." *Id.* at 599, ¶ 35, 161 P.3d at 1263. Additionally, Wife had an almost fourteen-year history of signing documents for Ruesga, demonstrating that he "had consented to his wife's control of his care and his insurance matters." *Id.*

¶ 17 Unlike *Ruesga,* nothing in our record suggests that Hurst had a history of signing on Mother's behalf as of the time of her admission to Silver Creek. *See, e.g.,* Rebecca E. Hatch, *Cause of Action for Enforcement of Arbitration Clause in Long–Term Care Agreement, in* 41 Causes of Action 2d 1, § 16 (2009) (A party "filing a motion to compel arbitration must be sure that there are sufficient facts to prove that an implied agency relationship existed at the time the arbitration agreement was signed."). The only evidence similar to *Ruesga* is the familial relationship between Hurst and Mother. Standing alone, such a relationship is insufficient to confer agency. *See Ruesga,* 215 Ariz. at 598, ¶ 33, 161 P.3d



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at 1262. Under the undisputed facts before the superior court, as a matter of law, actual implied authority did not exist.

**C. Apparent Authority**

¶ 18 Silver Creek alternatively contends Hurst had apparent authority to act on Mother's behalf. "The touchstone of apparent authority is conduct of a principal that allows a third party reasonably to conclude that an agent is authorized to make certain representations or act in a particular way." *Miller v. Mason–McDuffie Co. of S. Cal.,* 153 Ariz. 585, 589, 739 P.2d 806, 810 (1987); *see also Servs. Holding Co. v. Transamerica Occidental Life Ins. Co.,* 180 Ariz. 198, 203, 883 P.2d 435, 440 (App.1994) ("[T]he source of the authority, actual or apparent, is the principal."). As with actual authority, apparent authority must be "traceable to manifestations of the principal." Restatement (Third) of Agency § 2.03. For the same reasons discussed *supra* regarding actual authority, the record reveals no manifestations by Mother that could establish Hurst's apparent authority to act as her agent in signing the Arbitration Agreement.

**D. Ratification**

¶ 19 Silver Creek also argues Mother acquiesced to Hurst's signature on the Arbitration Agreement "by accepting the benefit of the bargain without objection, and living at the Silver Creek facility for the better part of a year," and such acquiescence amounted to ratification. We disagree. "[M]ere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily amount to a ratification unless the silence or acquiescence in question cannot be explained on any other theory than that of ratification." 2A C.J.S. *Agency* § 72.

***5** ¶ 20 Ratification is the affirmance of a prior act by another, whereby the act is given effect as if done by an agent acting with actual authority. Restatement (Third) of Agency § 4.01. A person ratifies an act by (a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents. *Id.* Ratification may also exist when a principal accepts the benefit of a purported agent's unauthorized act with knowledge of the material facts. *Phx. W. Holding Corp.,* 18 Ariz.App. at 66, 500 P.2d at 326.

¶ 21 The only evidence of ratification that Silver Creek proffers is Mother's residency at its facility. Although this might be evidence that Mother acquiesced to her stay at Silver Creek, it does not demonstrate her assent to the Arbitration Agreement. There is no evidence that Hurst or Silver Creek representatives ever spoke with Mother regarding arbitration or the Arbitration Agreement. Nor is there evidence Mother had knowledge of the material facts regarding that agreement. Under these circumstances, no ratification of the Arbitration Agreement occurred as a matter of law.

**E. Statutory Agency**

¶ 22 In rather cursory fashion, Silver Creek contends Hurst was authorized to act as Mother's agent under A.R.S. § 36–3231(A)(2), which confers authority on "[a]n adult child of the patient ... to make health care decisions for the patient" if the "adult patient is unable to make or communicate health care treatment decisions." Even assuming that Silver Creek has properly preserved this argument for our review, we disagree. The statute confers authority to make "health care decisions." Whether to agree to arbitration is not a health care decision, particularly where, as here, the agreement to arbitrate is not a condition of admission or treatment.

## CONCLUSION [1]

¶ 23 We affirm the judgment of the superior court. We award Hurst his taxable costs on appeal upon compliance with ARCAP 21.

**All Citations**

Not Reported in P.3d, 2015 WL 3551874

Footnotes

1 Based on our determination, we need not address Hurst's alternative arguments regarding the purported invalidity of the Arbitration Agreement.

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